Annexe 131 : Le débat sur le transfert des accusés du TPIR au Rwanda, Arusha le 24 avril 2008 (Suite)

Annexe 131-1

Les mémoires déposés par les « Amis de la Cour » et les prises de position préalables à la aux délibération des chambres

L'audition des parties par les juges

Annexe 131-2

Les décisions des chambres

7. Décision de la Chambre 1 sur le dossier Gaspard Kanyarukiga, 6 juin 2008

ICTR-02-78-I
06-06-2008
(1499 — 1470)

1499
1494

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER DESIGNATED UNDER RULE 11 *BIS*

Before Judges:	Erik Møse, presiding Sergei Alekseevich Egorov Florence Rita Arrey
Registrar:	Adama Dieng
Date:	6 June 2008

2008 JUN -6 P 2:44
JUDICIAL RECORDS
RECEIVED

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

***Case No. ICTR-2002-78-R11*bis**

DECISION ON PROSECUTOR'S REQUEST FOR REFERRAL TO THE REPUBLIC OF RWANDA

The Prosecution
Hassan Bubacar Jallow
Bongani Majola
Alex Obote-Odora
Richard Karegyesa
George Mugwanya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

The Defence
Ernest Midagu Bahati
Camille Yuma

1498

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as a Chamber designated under Rule 11 *bis*, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecutor's "Request for the Referral of the case of Gaspard Kanyarukiga to Rwanda pursuant to Rule 11 *bis*" etc., filed on 7 September 2007;

NOTING the Defence Response, filed on 16 November 2007, and the Prosecution Reply, filed on 5 December 2007;

FURTHER NOTING the *amicus curiae* submissions filed by the Republic of Rwanda on 22 November 2007, Human Rights Watch on 27 February 2008, the International Criminal Defence Attorneys Association (ICDAA) on 29 February 2008 and the Kigali Bar Association on 17 March 2008, as well as responses to the submissions;

HEREBY DECIDES the Request.

INTRODUCTION

1. On 4 March 2002, the Indictment was confirmed against Gaspard Kanyarukiga, who was a businessman in the Kigali and Kibuye prefectures in Rwanda. It contained four counts: genocide, or in the alternative complicity in genocide, conspiracy to commit genocide, and extermination as a crime against humanity.[1] Kanyarukiga pleaded not guilty to all counts during his initial appearance on 22 July 2004.[2]

2. On 7 September 2007, the Prosecutor submitted a request for referral of this case to the Republic of Rwanda for trial.[3] The Defence responded on 16 November 2007, opposing such referral.[4] On 2 October 2007, the President of the Tribunal designated a Chamber under

[1] Decision on Confirmation of an Indictment against Gaspard Kanyarukiga, 4 March 2002, p. 2.
[2] T. 22 July 2004 p. 7.
[3] The Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007 (below referred to as the "Prosecution Request"). Four similar transfer requests have been filed and assigned to Chambers of the Tribunal: *The Prosecutor v. Fulgence Kayishema,* The Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *The Prosecutor v. Yussuf Munyakazi,* The Prosecutor's Request for the Referral of the Case of Yussef Munyakazi to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Idelphonse Hategekimana,* The Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *The Prosecutor v. Jean-Baptiste Gatete,* The Prosecutor's Request for the Referral of the Case of Jean-Baptiste Gatete to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 28 November 2007. Fulgence Kayishema is at large, whereas the other three accused are at the ICTR detention facilities in Arusha. A decision has been rendered in one of these cases, *see The Prosecutor v. Yussuf Munyakazi*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda (Referral Bench), 28 May 2008, in which transfer was denied.
[4] *Réponse de la Défense à la requête du Procureur portant transfert de l'Accusé Gaspard Kanyarukiga au Rwanda*, 16 November 2007 ("Defence Response"). *See also* Prosecutor's Reply to this Response, 5 December 2007 ("Prosecution Reply"), after having sought an extension on 22 November 2008. The Chamber has according to case law discretion to consider late submissions. It has considered the Reply without making a formal decision on the request for extension, which is hence moot.

Rule 11 *bis* of the Rules of Procedure and Evidence, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey.[5]

3. On 14 November 2007, Trial Chamber I granted the Prosecution leave to amend the Indictment.[6] The Amended Indictment is the basis of the present transfer request.[7] On the basis of acts in Kivumu commune, Kibuye prefecture, it charges Kanyarukiga with genocide, or in the alternative complicity in genocide, and extermination as a crime against humanity. The focus of the Indictment is an attack against Nyange church on 15 April 1994, where about 2,000 Tutsi refugees were allegedly killed. Kanyarukiga is accused of having participated in a joint criminal enterprise comprising Athanase Seromba, Fulgence Kayishema and others.[8]

4. Following applications pursuant to Rule 74 of the Rules, the Chamber granted *amicus curiae* status to the Republic of Rwanda, Human Rights Watch, the International Criminal Defence Attorneys Association (ICDAA) and the Kigali Bar Association.[9] They have provided written submissions on Rwanda's ability to satisfy the requirements of Rule 11 *bis* (C).[10] The Prosecution and the Defence have responded to the briefs of some of the *amici*.[11]

5. Rwanda supports the Prosecutor's Request. It submits that it is willing and able to accept Kanyarukiga's case before a competent court in Rwanda and that he will receive a fair

---

[5] Designation of Trial Chamber for the Referral of the Case of Gaspard Kanyarukiga to Rwanda (President), 2 October 2007.

[6] Decision on Prosecution Request to Amend the Indictment (TC), 14 November 2007. The Amended Indictment withdrew the count of conspiracy to commit genocide, clarified the modes of participation and provided better particulars of the charges against Kanyarukiga. The Defence did not oppose the amendments.

[7] *The Prosecutor v. Savo Todović*, Decision on Rule 11*bis* Referral (AC), 23 February 2006, para. 14 (a Referral Bench must base its considerations concerning the referral of a case on the operative indictment); *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Milan Lukić Appeal Regarding Referral (AC), 11 July 2007, para. 12.

[8] *See The Prosecutor v. Athanase Seromba*, Judgement (TC), 13 December 2006, and Judgement (AC), 12 March 2008. An indictment against Fulgence Kayishema was issued on 10 July 2001. As mentioned above (footnote 3), the Prosecutor has also requested that his case be transferred to Rwanda.

[9] Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae* (TC), 9 November 2007; Decision on *Amicus Curiae* Request by the International Criminal Defence Attorneys Association (ICDAA) (TC), 22 February 2008; Decision on *Amicus Curiae* Request by the Kigali Bar Association (TC), 22 February 2008. In its Decision on Defence Request to Grant *Amicus Curiae* Status to Four Non-Governmental Organisations (TC), 22 February 2008, the Chamber denied such status to three non-governmental organisations but accepted the Defence request with regard to Human Rights Watch, which had demonstrated an intention to provide submissions by doing so in Rule 11 *bis* proceedings before another Chamber. *See also* Decision on *Amicus Curiae* Request by Human Rights Watch (TC), 29 February 2008 (considering its request moot, as such status had already been granted). Requests from three other organisations were denied, *see* Decision on *Amicus Curiae* Request by the Organisation of Defence Counsel (ADAD) (TC), 22 February 2008, and Decision on *Amicus Curiae* Request by Ibuka and Avega (TC), 22 February 2008.

[10] Amicus Curiae briefs were filed by the Republic of Rwanda on 22 November 2007 ("Rwanda's Brief"), by Human Rights Watch on 27 February 2008 ("HRW Brief"), and by ICDAA on 29 February 2008 ("ICDAA Brief"). On 21 April 2008, Rwanda requested the Chamber to consider its response of 6 March 2008 to Human Rights Watch in the Kayishema case as also being part of the submissions in the Kanyarukiga case ("Rwanda's Response to HRW"), and the Chamber has done so. The Kigali Bar Association filed its brief on 17 March 2008 ("Kigali Bar Brief"), after the deadline. On the same date, it sought an extension of time. The Chamber has considered the Kigali Bar Brief without issuing a formal decision to that effect. The request for extension is therefore moot (see similarly footnote 4).

[11] The Prosecution filed its Response to ICDAA on 7 March 2008 ("Prosecution Response to ICDAA"). In a request of 11 April 2008, it asked the Chamber to consider its Response of 21 January 2008 to Human Rights Watch in the Kayishema case as part of the submissions in the Kanyarukiga case ("Prosecution Response to HRW"). The Chamber has done so. The Defence filed its submissions on the ICDAA Brief on 13 March 2008.

trial there. The Kigali Bar Association is also in favour of transfer. The Defence, Human Rights Watch and ICDAA oppose transfer. The submissions of the parties and the *amici* are summarised below. They are comprehensive and the Chamber has not found any need for an oral hearing.[12]

DELIBERATIONS

6. Rule 11 *bis* (C) allows a designated Trial Chamber to refer a case to a competent national jurisdiction if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. According to Rule 11 *bis* (A), referral may be ordered to a State (i) in whose territory the crime was committed, or (ii) in which the accused was arrested, or (iii) which has jurisdiction and is willing and adequately prepared to accept the referral.[13]

7. The Prosecution Request is based on Rule 11 *bis* (A)(i), which does not contain any explicit requirement concerning a State's willingness and preparedness to accept a referral. However, it follows from case law that this is implicit in a Rule 11 *bis* (C) analysis.[14] The Chamber notes that the Republic of Rwanda has stated that it is willing and is prepared to accept Kanyarukiga's case for prosecution.[15]

A. Legal Framework

8. The Appeals Chamber has established that a Trial Chamber designated under Rule 11 *bis* must consider whether the State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[16]

---

[12] The Chamber notes that an oral hearing took place in *The Prosecutor v. Yussuf Munyakazi* (footnote 3 above), *see* T. 24 April 2008 pp. 1-83.

[13] It is recalled than unlike its ICTY counterpart, Rule 11 *bis* of the ICTR Rules does not require that the Chamber "shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused", *see* ICTY Rule 11 *bis* (C).

[14] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 40 relating to the equivalent provisions in the ICTY Rules of Procedure and Evidence ("as a strictly textual matter, Rule 11*bis* (A) does not require that a jurisdiction be "willing and adequately prepared to accept" a transferred case if it was the territory in which the crime was committed ... But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a prepared case is an explicit prerequisite for any referral to a domestic jurisdiction ... Thus, the "willing and adequately prepared" prong of Rule 11*bis* (A)(iii) of the Rules is implicit also in the Rule 11*bis*(B) analysis"). *See also The Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Savo Todović's Appeal Against Decisions on Referral under Rule 11*bis* (AC), 4 September 2006, para. 88.

[15] Letter of 5 September 2007 from the Rwandan Prosecutor General to the ICTR Prosecutor (Annex A to the Prosecution Request). The letter also contains assurances that Kanyarukiga will be afforded a fair trial and that, if convicted, he will not be subject to the death penalty.

[16] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 9, referring to *The Prosecutor v. Zeljko Mejakić et al.*, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11*bis* (AC), 7 April 2006, para. 60. *See* also *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* etc. (Referral Bench), 5 April 2007, paras. 44–45; *The Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis* (Referral Bench), 14 September 2005, paras. 32 and 46); *The Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11*bis* (Referral Bench), 22 July 2005, para. 27; *The Prosecutor v. Zeljko Mejakić et al.*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* (Referral Bench), 20 July 2005, para. 43; *The Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Referral of Case under Rule 11*bis* etc. (Referral Bench), 8 July 2005, para. 34.

(i) Personal Jurisdiction

9. According to the Indictment, Kanyarukiga's alleged crimes were committed in Rwanda. Consequently, Rwandan courts have personal jurisdiction over him pursuant to Article 6 of the Rwandan Penal Code.[17]

(ii) Material Jurisdiction

10. The Prosecution and the Republic of Rwanda submit that Rwanda's legal framework criminalises Kanyarukiga's conduct in terms identical to the provisions of the ICTR Statute. According to Human Rights Watch, transfer may not be possible due to a potential lack of subject matter jurisdiction.[18]

11. The Chamber is not the competent authority to decide in any binding way which law is to be applied if the case is transferred. This is a matter which would be within the competence of the High Court and the Supreme Court of Rwanda. But the Chamber must be satisfied that there is an adequate legal framework which criminalises Kanyarukiga's conduct so that the allegations can be duly tried and determined.[19]

12. Article 1 of Organic Law of 16 March 2007 on the Transfer of Cases ("Transfer Law") states that the law "shall regulate the transfer of cases and other related matters, from the International Criminal Tribunal for Rwanda and from other States to the Republic of Rwanda". Article 3 provides that a person whose case is transferred by the ICTR to Rwanda "shall be prosecuted only for crimes falling within the jurisdiction of the Tribunal". The Transfer Law does not contain any explicit legal definitions of genocide and crimes against humanity.[20]

13. The Prosecution and the Republic of Rwanda have referred to a law of 1996 concerning the prosecution of genocide and a law of 2004 pertaining to the Gacaca courts.[21] Human Rights Watch argues that the 1996 Genocide Law was abrogated by the 2004 Gacaca Law, and that the latter does not define the crimes of genocide and other violations of international humanitarian law. Therefore, the Chamber "should inquire into this apparent discrepancy and whether there is a complete definitional basis for the relevant crimes in Rwandan law" to support transfer.[22]

---

[17] Rwanda's Brief, para. 9, citing Article 6 of the Rwandan Penal Code of 18 August 1977 as subsequently amended (Annex D to the Prosecution Request): "*Toute infraction commise sur le territoire Rwandais par les Rwandais ou des étrangers est punie conformement à la loi Rwandaise, sous réserve de l'immunité diplomatique consacrée par les conventions ou les usages internationaux.*"

[18] Prosecution Request, paras. 18-33; Rwanda's Brief, paras. 11-16; HRW Brief, paras. 18-24; Prosecution Response to HRW, paras. 9-20; Rwanda's Response to HRW, paras. 21-25.

[19] *See* footnote 16.

[20] Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and From Other States, Annex B to the Prosecution Request.

[21] Organic Law No. 08/96 of 30 August 1996 on the Organisation of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 ("1996 Genocide Law") (Annex C to the Prosecution Request); Organic Law No. 16/ 2004 of 19 June 2004 Establishing the Organisation, Competence, and Functioning of Gacaca Courts ("2004 Gacaca Law").

[22] HRW Brief, paras. 22-23 (noting that Rwandan courts convicted 204 persons for crimes of genocide between January 2005 and September 2007 under the 2004 Gacaca Law and the Penal Code). Human Rights Watch also argues that Law 33/bis/2003 Punishing the Crime of Genocide, Crimes against Humanity and War Crimes

14. The Chamber recalls that Article 1 of the 1996 Genocide Law, which was replaced by the 2004 Gacaca Law, provided for criminal proceedings against persons who since 1 October 1990 committed acts constituting

> a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, the three of which were ratified by Rwanda; or
>
> b) offences set out in the Penal Code which the Public Prosecution Department alleges or the defendant admits were committed in connection with the events surrounding the genocide and crimes against humanity.

This text referred to the definitions of the crimes in the relevant international conventions. However, the 1996 Genocide Law will not be applicable to any cases that may be transferred from the Tribunal to Rwanda.[23]

15. The 2004 Law reorganised the Gacaca courts charged with trying the perpetrators of "the crime of genocide and crimes against humanity" committed between 1 October 1990 and 31 December 1994 (Article 1) and maintained that cases concerning offenders belonging to the so-called "first category" should be heard by the ordinary courts (Article 2). According to Article 51, that category comprises, amongst others, persons who planned, organised and supervised "the genocide or crimes against humanity", together with his or her accomplices. Consequently, both Articles 1 and 51 specifically mention genocide and crimes against humanity but without any explicit definitions.

16. The Genocide Convention of 1948 as well as the four Geneva Conventions of 1949 and their two Additional Protocols of 1997 were all binding on the Republic of Rwanda in 1994. It has also ratified the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[24] According to Article 190 of the Rwandan Constitution of 2003, treaties which Rwanda has ratified are "more binding than organic and ordinary laws".[25] This formulation indicates that the conventions have been incorporated into national law and carry considerable weight.[26]

("2003 Law"), which contains very specific definitions in Articles 2 (genocide), 5 (crimes against humanity) and 6 (war crimes) does not seem to have retroactive effect. The Republic of Rwanda has confirmed that the 2003 Law is irrelevant in relation to transferred cases as it is applicable only for crimes that are committed after its entry into force (Rwanda's Brief, para. 26 c).

[23] Article 105 of the 2004 Gacaca Law states that the 1996 Genocide Law, as well as another law establishing Gacaca courts and all previous legal provisions "contrary to this organic law, are hereby abrogated".

[24] The Republic of Rwanda ratified or acceded to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide on 16 April 1975; the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War on 5 May 1964; the Additional Protocols to the Geneva Conventions on 19 November 1984; and the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 16 April 1975 ("1968 Convention").

[25] The Rwandan Constitution, adopted in Referendum of 26 May 2003 (Annex F to the Prosecution Request contains excerpts). Article 190 continues "except in case of non compliance of one of the parties". This proviso appears inapplicable in the present context.

[26] The formulation "more binding than ... laws" is not clear but suggests that the conventions carry more weight than ordinary legislation and may prevail in case of a conflict with domestic law. The submissions do not specifically address this issue, which is not decisive to the Chamber's findings.

17. A closer examination confirms the impact of these conventions in Rwandan law. In conformity with the 1968 Convention, Article 13 of the Constitution provides that "the crime of genocide, crimes against humanity and war crimes do not have a period of limitation". As mentioned above, the 1996 Genocide Law contained explicit references to the Genocide Convention, the Geneva Conventions and Protocols, and the 1968 Convention. Furthermore, the preamble of the 2004 Gacaca Law expressly refers to the Genocide Convention and to the 1968 Convention.[27] Rwandan jurisprudence confirms that the ordinary courts have applied the Genocide Convention, the applicable Geneva Convention or the 1968 Convention, depending on the charges, together with the material provisions of its Penal Code and the 1996 Law (which was subsequently replaced by the 2004 Gacaca Law, see para. 13 above).[28]

18. According to the Republic of Rwanda, the 2007 Transfer Law will unambiguously govern cases transferred from the ICTR. That law is not only *lex specialis* but will apply together with other applicable provisions, such as the ICTR Statute, the Penal Code and the 2004 Gacaca Law.[29] The Chamber considers that the formulation in Article 3 of the Transfer Law (providing for prosecution "only for crimes falling within the jurisdiction of the Tribunal") strongly suggests that they will be tried for the crimes as they are defined in Article 2 (genocide) and Article 3 (crimes against humanity) of the ICTR Statute.[30] Furthermore, Article 25 of the Transfer Law provides that in the event of an inconsistency between that law and any other law, the Transfer Law shall prevail.[31]

19. Having considered the relevant provisions in the Transfer Law, applicable conventions, Article 190 of the Constitution, legislation as well as domestic case law, the Chamber is satisfied that Rwanda has subject-matter jurisdiction over the crimes charged in the Indictment against Kanyarukiga.

(iii) Temporal Jurisdiction

20. Without referring to any specific provision, the Defence argues that the genocide legislation refers to acts committed from 1 October 1990 without any further limitation in time, and that this is not in conformity with the ICTR Statute.[32] The Chamber recalls that Article 3 of the Transfer Law provides that "notwithstanding the provisions of other laws in

---

[27] The preamble reads: "Considering that the crime of genocide and crimes against humanity are provided for by the International Convention of 9 December 1948 relating to repression and punishment of the crime of genocide"; "Considering the Convention of 26 November 1968 on imprescriptibility of war crimes and crimes against humanity". (Some stylistic changes have been made in the available English translation.)

[28] *See*, for instance, *Recueil de jurisprudence contentieux du genocide* (elaborated by *Avocats Sans Frontières* in co-operation with the Supreme Court of Rwanda et al.), Volume V pp. 13 *et seq.* (*Higiro et al.*, judgment of 14 March 2003, Court of First Instance, Butare); Volume VII pp. 41 *et seq.* (*Mbarushimana et al.*, judgment of 7 January 2005, Court of First Instance, Gisenyi); pp. 163 *et seq.* (*Bayingana et al.*, judgment of 29 July 2005, High Court of Cyangugu); pp. 257 *et seq.* (*Ndinkabandi et al.*, judgment of 20 July 2005, Supreme Court, referring to the Genocide Convention, the applicable Geneva Convention and the Convention of 1968).

[29] Rwanda's Brief, para. 14; Rwanda's Response to HRW, para. 25.

[30] The Chamber recalls that neither the Genocide Convention nor the Geneva Conventions and Protocols define crimes against humanity (which prior to the *ad hoc* Tribunals' Statutes had its basis in customary international law). The definition of crimes against humanity in the 1968 Convention is only partial. Neither the parties nor the *amici* have addressed this issue. The Chamber is satisfied that the reference to the ICTR Statute in Article 3 of the Transfer Law (which includes a reference to Article 3 in the ICTR Statute), remedies any lacuna that may exist. Finally, there is no need for the Chamber to consider the legal basis of war crimes (Article 4 of the ICTR Statute) in Rwandan law, as they do not form part of the Indictment against Kanyarukiga.

[31] Article 25 of the Transfer Law reads: "In the event of any inconsistency between this Organic Law and any other Law, the provisions of this Organic Law shall prevail" (Annex B to the Prosecution Request).

[32] Defence Response, paras. 38-39, 43.

Rwanda", persons who are transferred from the Tribunal shall be prosecuted "only" for crimes falling with the jurisdiction of the ICTR. It follows from Articles 1 and 7 of the Statute that the ICTR only has jurisdiction to prosecute acts committed between 1 January and 31 December 1994. The formulation in the Transfer Law indicates that Kanyarukiga, if transferred, will not be prosecuted for acts committed before or after this period.[33]

(iv) Modes of Participation

21. Pursuant to Article 6 (1) of the Statute, Kanyarukiga is alleged to have planned, instigated, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes. This provision covers both principal perpetrators as well as accomplices. The Prosecution submits that the Republic of Rwanda possesses an adequate legal framework to try Kanyarukiga on similar forms of responsibility. Article 89 of the Rwandan Penal Code identifies both principal perpetrators and accomplices to crimes, Article 90 defines the author of crimes, and Article 91 mentions the various forms of complicity to crimes.[34] The Chamber finds the modes of participation in Rwandan law to be similar in substance to those found in Article 6 (1) of the Statute and Tribunal jurisprudence.

(v) Penalties

22. As mentioned above, a Chamber designated under Rule 11 *bis* must satisfy itself that the transfer State has an adequate penalty structure.[35] Article 21 of the Transfer Law states: "Life imprisonment shall be the heaviest penalty imposed upon a convicted person in a case transferred to Rwanda from ICTR." This corresponds to Article 23 of the ICTR Statute and Rule 101 of its Rules. Article 82 of the Rwandan Penal Code directs the court to assess the punishment in view of all circumstances in connection with the crime and to consider mitigating factors. Under Article 22 of the Transfer Law, the court shall give credit for the period spent in detention. The Chamber considers that the Rwandan penalty structure addresses the intrinsic gravity of international crimes and conforms to accepted sentencing practices.[36]

23. It follows from Article 4 of the Transfer Law that if the case is transferred, the Rwandan Prosecutor will adapt the Tribunal's Indictment to the Rwandan Code of Criminal Procedure.[37] According to the Republic of Rwanda, investigations will be carried out in order to establish whether the evidence relied on by the ICTR still is available for trial.[38] The Defence argues that there is a risk that the Indictment may be recast upon transfer. This may

[33] This also seems to follow from Rwanda's Brief, para. 14 ("The Republic of Rwanda deferred to the jurisdiction of the ICTR and will not exercise concurrent jurisdiction to prosecute the accused otherwise than in accordance with a referral by the ICTR pursuant to Rule 11 *bis*, and in conformity with the [Transfer Law]"). Under these circumstances, and in light of the Chamber's conclusion not to grant transfer in the present case, it is not necessary to go further into this issue.

[34] Prosecution Request, paras. 23-25, referring to the Rwandan Penal Code (Annex D to the Prosecution Request). In particular, Article 91 encompasses, amongst other forms, complicity by instigation, complicity by aiding and abetting, and complicity by preparing the means to commit the crime.

[35] Footnote 16 above; Prosecution Request, paras. 26-33.

[36] Submissions concerning solitary confinement will be addressed below, paras. 94-96.

[37] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).

[38] Rwanda's Brief, paras. 46-48.

result in different penalties than under the ICTR regime, and exclude Kanyarukiga from pardon or commutation of sentence.[39]

24. The Chamber considers that national investigations may be required to prepare a transferred case for trial. Furthermore, case law has accepted that an international indictment be adapted to national provisions.[40] The remainder of the Defence submissions are based on a distinction between two forms of life imprisonment under Rwandan law, "life imprisonment" and "life imprisonment with special provisions". According to the Defence, the latter will exclude pardon and commutation of sentence. The Chamber observes that Article 21 of the Transfer Law refers to "life imprisonment" only and not "special provisions". To the extent that Kanyarukiga may risk "life imprisonment with special provision" if transferred (below, para. 96), the Defence submission does not prevent transfer. It follows from Article 27 of the ICTR Statute and Rule 124 and 125 of the Rules that convicted persons only may obtain pardon or commutation (including early release) if they are eligible for such measures according to the legislation of the country in which they are serving their sentences and if the President of the Tribunal finds that pardon or commutation is appropriate.

B. Death Penalty

25. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". This condition for transfer is met. In relation to transferred cases, capital punishment is excluded by Article 21 of the Transfer Law, quoted above (para. 22). The Republic of Rwanda has also abolished the death penalty from its entire legal system.[41] By abolishing capital punishment, it removed one of the impediments to transfer of cases from the ICTR.[42] Submissions concerning conditions during life imprisonment will be addressed below (paras. 89-96).

---

[39] Defence Response, paras. 40-42 (*remaniement de l'acte de l'accusation*), *see also* paras. 35-37.

[40] *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), 30 August 2006, para. 17 ("The Appeals Chamber agrees with the Prosecution that the concept of a 'case' is broader than any given charge in an indictment", holding that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before the Tribunal); *The Prosecutor v. Radivan Stankovic*, Decision on Referral of Case under Rule 11 *bis* (Referral Bench), 17 May 2005, para. 74, referring to the adaptation of indictments under the Transfer Law of Bosnia and Herzegovina (*see* also paras. 24, 45-46).

[41] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex E to the Prosecution Request). Article 2 reads: "The death penalty is hereby abolished", whereas Article 3 provides: "In all the legislative texts in force before the [entry into force] of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions". The Defence is therefore not correct when it argues (Response, paras. 28, 40) that legislation concerning death penalty still applies in Rwanda. The concerns that capital punishment may be reintroduced (Defence Response, paras. 43-44) are speculative. A re-introduction of the death penalty would be a basis for revocation of the transfer order under Rule 11 *bis* (F).

[42] This was the point made by the ICTR Prosecutor in his address to the Security Council on 15 December 2006 ("Rwanda ... is not yet ready in the sense of fulfilling the conditions of transfer, to receive from the ICTR cases of indictees for trial"). ICDAA's submission that the statement referred to the issue of fairness before Rwandan courts (Brief, para. 18) is inaccurate. This follows clearly from the context of the Prosecutor's statement ("The indications are that the death penalty, a major obstacle to the transfer of any case to Rwanda, will be abolished not just in relation to the cases of the ICTR, but across the board. A soon as that is accomplished I shall be requesting the transfer of cases ... I hope this can be done in the first half of 2007").

1490

C. Fair Trial

(i) General Considerations

26. Rule 11 *bis* (C) requires the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that Rwanda's legal framework includes the fair trial guarantees recognized by the ICTR Statute and human rights conventions. The Defence, Human Rights Watch and ICDAA dispute this.[43]

27. The Chamber recalls that the right to a fair trial follows from several international instruments, including Articles 19 and 20 of the ICTR Statute, Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), and Article 7 of the African Charter on Human and Peoples' Rights (ACHR). The Republic of Rwanda is a party to the ICCPR and the ACHR.[44] It has provided reports to the supervisory bodies under these conventions.[45]

28. At the domestic level, Rwanda has adopted many provisions of relevance to the right to a fair trial. The Constitution contains a separate chapter on human rights which includes fair trial guarantees, such as Articles 11 and 16 (non-discrimination and equality before the law), 15 (right to physical and mental integrity), 18 (deprivation of liberty; information about charges), 19 (presumption of innocence; fair and public hearing; access to court), 20 (non-retroactivity of criminal laws) and 44 (the judiciary as the guardian of rights and freedoms).[46] The legislation also provides protection, such as the Code of Criminal Procedure.[47]

29. With regard to transfer of cases the Chamber observes that Article 13 of the Transfer Law lists the following rights:

> (1) the accused shall be entitled to a fair and public hearing;
>
> (2) the accused shall be presumed innocent until proved guilty;

---

[43] Prosecution Request, paras. 36-74; Defence Response paras. 48-55; Rwanda's Brief, paras. 31-40; HRW Brief, paras. 12-15; Kigali Bar Brief, paras. 7-8; ICDAA Brief, paras. 18-27.

[44] The Republic of Rwanda ratified the ICCPR on 16 April 1975 and the ACHR on 15 July 1983. The Prosecution points out that Rwanda also has accepted scrutiny under the optional program established under the African Union, the New Partnership for Africa's Development review (NEPAD). Among the objectives of this program is the promotion of sustainable development, good governance and human rights (Prosecution Request, para. 73).

[45] The Prosecution argues that the Republic of Rwanda's "compliance action under treaties and programmes mentioned above enables Rwanda to draw from the expertise of the members of those bodies in an effort to progressively enhance her compliance with human rights obligations, including those in relation to fair trials and due process" (Prosecution Request, para. 73). This is not entirely convincing. Rwanda's third periodic report under Article 40 of the Covenant, which was expected on 10 April 1992, was submitted on 23 July 2007 and has not been examined by the Human Rights Committee. Rwanda has not accepted the Optional Protocol to the ICCPR concerning individual communications. The Chamber does not have available any information about the reports submitted under the ACHR.

[46] Rwandan Constitution of 2003, Title II: "Fundamental Human Rights and the Rights and Duties of the Citizen" (Annex F to the Prosecution Request).

[47] The Republic of Rwanda refers to Article 1 (3) of Law No. 20/2006 of 22 April 2006 Modifying and Complementing the Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure, and provides the following quote (Rwanda's Response to HRW, para. 30): "Criminal judgments must be held in public audience, be fair, impartial, comply with the principle of self-defence, cross-examination, treat litigants equal in the eyes of the law, based on evidence legally produced and be rendered without any undue delay."

(3) the accused shall be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her;

(4) the accused shall be given adequate time and facilities to prepare his and her defence;

(5) the accused shall be entitled to a speedy trial without undue delay;

(6) the accused shall be entitled to counsel of his or her choice in any examination. In case he or she has no means to pay, he or she shall be entitled to legal representation;

(7) the accused shall have the right to be tried in his or her presence;

(8) the accused shall have the right to examine, or have a person to examine for him or her the witnesses against him or her;

(9) the accused shall have the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(10) the accused shall have the right to remain silent and not to be compelled to incriminate himself or herself.[48]

30. This list of rights is supplemented by other provisions in the Transfer Law, such as Articles 5 (lawful arrest and detention), 7 para. 2 (no conviction based solely on written witness statements), 9 para. 2 (right to cross-examination), 14 (protection of witnesses), 15 (status of the Defence), and 23 (conditions of detention). Furthermore, it is recalled that Article 190 of the Constitution states that international conventions are "more binding" than other laws (above, para. 16).

31. The above overview illustrates that the Republic of Rwanda has made notable progress in improving its judicial system.[49] The Chamber accepts that the Rwandan legal framework generally mirrors the right to a fair trial as embodied in Article 20 of the ICTR Statute. However, the issue in the present transfer proceedings is not only whether Rwandan law contains the required guarantees. The Defence, Human Rights Watch and ICDAA argue that there is a gap between judicial theory and practice, especially for prosecutions of persons accused of genocide and other crimes of political importance.[50] They have provided illustrations relating to the general situation in the country, experiences from the ordinary courts, and from the Gacaca jurisdictions.

32. The Prosecution disputes these concerns, considering them speculative, generalized and unsubstantiated. The Republic of Rwanda characterises them as fears based on isolated and sporadic incidents, which have occurred in the course of fighting impunity in a post-genocide environment. The "Rwandan judicial system does not have to be qualified as near to perfection" to qualify for transfer. It also submits that "the task of the Trial Chamber is only

[48] Annex B to the Prosecution Request, which contains the text of Article 13 in Kinyarwanda, English and French. Some minor inconsistencies in the English version have been corrected above.

[49] This is, for instance, the view of Human Rights Watch. In addition to long-standing knowledge of the situation in Rwanda, this non-governmental organisation has been monitoring the judicial system there since 2005 (HRW Brief, paras. 3-4, 17). Referring to Rule 94 (B) of the Rules of Procedure and Evidence, the Republic of Rwanda requests the Chamber to take judicial notice of the progress made in its legal system (Rwanda's Response to HRW, para. 8, 9 and 42 c). However, Rule 94 (B) is not applicable as it refers to adjudicated facts "from other proceedings of the Tribunal".

[50] *See*, in particular, Defence Response, paras. 43-47 (about "*insecurité juridique*"); HRW Brief, paras. 12 and 13 ("On their face Rwanda's laws comply with the fair trial provisions of Article 20 of the Statute ... Nevertheless, these laws are inconsistently applied"); ICDAA Brief, para. 22 ("Basic principles of fairness are very often ignored within the Rwandan national judicial system, either in theory or practice, or both").

to determine whether the laws applicable to proceedings against the accused in Rwanda provide an adequate basis for fair trial".[51]

33. The Chamber recalls that its task under Rule 11 *bis* is to satisfy itself that the accused will receive a fair trial if transferred. Information which the Chamber reasonably feels it needs to determine this issue is therefore relevant.[52] This includes experience from proceedings before Rwandan courts. But it is also important to bear in mind that the Prosecution request is based on a specific legal regime, established by Rwanda to facilitate transfer under Rule 11 *bis*. This regime only involves the High Court and the Supreme Court which will conduct proceedings within the framework of the Transfer Law. As no accused at the ICTR has been transferred to Rwanda, there is no practice under this specific regime. Furthermore, the Prosecution has taken steps to ensure international monitoring of transferred trials under Rule 11 *bis* (D)(iv).[53] The task of the Chamber is to determine whether Kanyuarukiga will receive a fair trial if transferred under these particular circumstances. Below it will examine the specific issues that have been raised.

(ii) Judicial Independence, Impartiality and Capacity

34. According to the Prosecution and Rwanda, the courts and judges are independent and impartial. The Defence disputes this. Human Rights Watch submits that even though judicial independence is guaranteed by law, there is executive interference in practice. ICDAA also questions the independence of the judiciary.[54]

35. The Chamber notes that Rwanda has adopted a legal framework concerning independence and impartiality. The Constitution states that the judiciary is independent and separate from the legislative and executive arms of government, and that it enjoys financial and administrative autonomy (Article 140). Judges hold office for life and shall not be suspended, transferred, or otherwise removed from office (Article 142).[55] The Superior Council of the Judiciary is responsible for the appointment, discipline and removal of judges (Articles 157 and 158).[56] Article 1 of the Code of Criminal Procedure provides for trials by a

[51] Rwanda's Response to HRW, in particular paras. 7, 11-12 (with quotes), 15, 31.

[52] *See* similarly (in relation to monitoring) *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), para. 50 ("The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: whatever information the Referral Bench reasonably feels it needs, and whatever orders is reasonably finds necessary, are within the Referral Bench's authority, so long as they assist the Bench in determining whether the proceedings following the transfer will be fair. The Referral Bench must bear in mind the considerable discretion that the Rule affords the Prosecutor, but always the ultimate inquiry remains the fairness of the trial that the accused will receive"). Rwanda's Response to HRW, para. 12 quotes Decision on Referral of Case under Rule 11*bis* in *Stankovic* (Referral Bench), 17 May 2005, para. 68 However, that passage is simply the conclusion after a discussion which is not confined to applicable laws (*see*, for instance, para. 67 of the Referral Bench's decision).

[53] Below, Section D (paras. 98-103).

[54] Prosecution Request, paras. 46-57; Defence Response, paras. 48-55; Rwanda's Brief, paras. 34-40; HRW Brief, paras. 49-54; Prosecution Response to HRW, paras. 39-44; Rwanda's Response to HRW, para. 33; ICDAA Brief, paras. 7-10; Prosecution Response to ICDAA, para. 6.

[55] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[56] Detailed provisions about the Superior Council are found in Organic Law No. 02/2004 of 20 March 2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary (Annex K to the Prosecution Request). Furthermore, Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts contains rules about the appointment and removal of judges as well as disciplinary powers.

competent, independent and impartial tribunal established by law.[57] An Ombudsman oversees the judiciary, and a Code of Ethics has been adopted.[58] These guarantees also apply to the High Court and the Supreme Court, which will hear cases under the Transfer Law.

36. The Defence points out that the President of the Republic of Rwanda has a role in the appointment of the President and Vice-President of the Supreme Court and of the High Court. He is also involved in the process leading to the appointment of the members of the Supreme Court and of the Superior Council overseeing the activities of the courts.[59] The Chamber notes that executive involvement in connection with judicial appointments exists in many countries. This does not in itself mean that the courts lack independence.

37. The Defence and ICDAA argue that there has been a tendency to fill higher positions, also in the judiciary, with Tutsis and exclude Hutus. The implication is that the courts may be biased, or that judicial proceedings cannot take place in a sufficiently calm and dispassionate climate.[60] The Chamber has not been provided with any statistical information, neither generally nor in relation to the ethnicity of judges appointed to the High Court and the Supreme Court.[61] But irrespective of the exact composition of those two judicial bodies, the Chamber does not find that these submissions prevent transfer. The acquittal rate in Rwanda in genocide cases is considerable. Many accused of Hutus origin have been acquitted by the ordinary courts, including cases where convictions are overturned on appeal.[62]

38. Human Rights Watch and ICDAA have provided examples to illustrate that there is a gap between law and practice with respect to judicial independence.[63] The Chamber does not underestimate the challenges facing the judiciary, which had to be reconstructed after the genocide in 1994. It also accepts the general observation by an independent expert group, referred to by Human Rights Watch, to the effect that the "concept of judicial independence is relatively new in Rwanda". But although some of the illustrations provided by the *amici*

[57] Law No. 13/2004 of 17 May 2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request). *See* similarly Article 64 (1) of Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts: "Courts shall be independent and separate from other state institutions."

[58] Prosecution Request, paras. 55-56. The Code was promulgated pursuant to Law No. 09/2004 of 29 April 2004 Relating to the Code of Ethics for the Judiciary.

[59] Defence Reply, paras. 50-51. According to Article 147 of the Constitution, the President and Vice-President of the Supreme Court are elected by the Senate and proposed by the President of the Republic after consultation with the Cabinet and the Supreme Council of the Judiciary. They are removed by the Chamber of Deputies or the Senate. Under Article 148, the President of the Republic, after consultation with the Cabinet and the Superior Council, submits a list of candidates for the Supreme Court to the Senate, which by an absolute majority elects the candidates.

[60] Defence Reply, para. 49; ICDAA Brief, paras. 24-26.

[61] The Chamber notes that the official policy of Rwanda seems to avoid public references to ethnicity. *See*, for instance, oral hearing in *The Prosecutor v. Yussuf Munyakazi* (T. 24 April 2007 pp. 55-56) where Counsel for the Republic of Rwanda, in relation to a question from the Bench about the composition of the High Court, answered: "... But, with due respect, I will not be going into the discussion of ethnic balance. It is against the policy of my country, it is against the constitution of my country, and I will not be doing that." *See also id.* p. 37.

[62] The Chamber does not take a position on the exact percentage of acquittals, which may differ according to whether not only the ordinary courts but also Gacaca proceedings are included in the calculation. It simply observes that the acquittal rate is considerable. Of ten cases reported in Volume VII (2004-2005) of *Recueil de jurisprudence contentieux du genocide* (footnote 28 above), five involved an acquittal of some type. In *The Prosecutor v. Yussuf Munyakazi*, Counsel for the Republic of Rwanda referred to an acquittal rate in his country of "close to 40 per cent" (T. 24 April 2007 p. 31, *see also* pp. 37, 38).

[63] HRW Brief, paras. 49-54 and ICDAA Brief, paras. 7-10. The Briefs also refer to "genocidal ideology" which is considered below (paras. 45, 54-55, 71-72) but has been taken into account also in the present context.

appear well-founded, they are mostly of a general nature and do not focus specifically on the High Court or Supreme Court which will adjudicate cases within the framework of the Transfer Law. For instance, in relation to interviews with 25 high-ranking Rwandan judicial officials stating that the courts were not independent in 2005, 2006 and 2007, there is no information about the basis for their view, which is generally formulated. Other illustrations show that there may have been specific attempts to influence judges but not that the alleged interference was successful.[64]

39. The Defence submits that the High Court will be composed of a single judge (Article 2 of the Transfer Law) and that three judges will constitute the Bench in the Supreme Court. This is different from the situation in the international tribunals, where there are three judges at the first instance level and five on appeal. The Defence argument is partly that the justice offered by Rwanda will be of a lower standard than at the ICTR, partly that a single judge may be more vulnerable to attempted interference.[65] The Republic of Rwanda has explained that all judgments in the first instance are pronounced by a single judge. This system was introduced through a judicial reform in 2004, based on a comparative survey of common and civil law systems in East, Central and Southern Africa.[66]

40. The Chamber observes that international legal instruments, including human rights conventions, do not require that a trial or an appeal has to be heard by a specific number of judges in order to be fair and independent. The fact that the Bench at the first instance level and on appeal is composed of fewer judges in Rwanda than at the international tribunals clearly does not prevent transfer. Single judge trials take place in many countries on several continents and may include serious cases which can lead to severe punishment. Rwanda has had single judge trials in genocide cases since 2004, and there is no information available that the acquittal rate has been lower in such trials. The Chamber has no basis for a finding that the situation may be different in a case transferred from the Tribunal.

41. Doubts have also been raised as to whether Rwandan judges have the required competence.[67] The Chamber is not convinced by these arguments. Even though some judges there may be young, they clearly have experience in adjudicating genocide cases. Furthermore, it appears that many judges in the High Court and the Supreme Court have more experience than the minimum requirements (six and eight years professional experience, respectively) prescribed by the law.[68]

42. It follows that the Chamber considers some of the concerns mentioned above well-founded. However, having considered them separately and together, it does not find that they constitute a sufficient basis to deny transfer to the judicial bodies under the Transfer Law.

---

[64] One example is an incident of alleged executive interference with the High Court, mentioned in HRW Brief, para. 53.

[65] Defence Response, para. 53; Prosecution Reply, paras. 31-33.

[66] Rwanda's Brief, paras. 36 and 40, referring to Organic Law No. 07/2004 of 25 April 2004 Determining the Organisation, Functioning and Jurisdiction of the Courts. It provides for single judges in Articles 7 (Lower Instance Court), 16 (Higher Instance Court) and 26 ("The High Court of the Republic shall hear cases in the first instance while being constituted of a single judge assisted by a registrar. However, in the course of hearing appeals from decisions of lower courts, it shall be constituted of three judges assisted by a court registrar").

[67] Prosecution Request, paras. 15, 43-45; Defence Reply, para. 53. Rwanda's Brief, paras. 17-19; HRW Brief, paras. 73, 83-85.

[68] Rwanda's Brief, para. 19. A similar argument was unsuccessfully put forward in *Prosecutor v. Mitar Rasević and Savo Todović*, Decision on Savo Todović's Appeals Against Decisions on Referral under Rule *11bis* (AC), 4 September 2006, paras. 86, 88-91.

1485

(iii) Presumption of Innocence

43. Article 19 of the Constitution provides that every accused person "shall be presumed innocent until his or her guilt has been conclusively proved in accordance with the law in a public and fair hearing in which all the necessary guarantees for defence have been made available".[69] This provision is in conformity with several human rights treaties to which Rwanda is a party, for instance Article 14 (2) of the ICCPR. Article 44 (2) of the Code of Criminal Procedure also provides that "an accused is presumed innocent until proven guilty".[70] The principle is reiterated in Article 13 (2) of the Transfer Law (above, para. 29). Consequently, the presumption of innocence clearly forms part of Rwandan law. The question is whether it is applied in practice.

44. Human Rights Watch mentions several illustrations to show that there is a preconceived attitude against genocide suspects. The Prosecution, the Republic of Rwanda and the Kigali Bar Association dispute these submissions.[71] The Chamber notes that the examples referred to by Human Rights Watch do not include activities before Rwandan courts. One of them is the denial of voting rights to persons in pre-trial detention. This indicates a possible problem with electoral legislation, but does not demonstrate that judges in a trial will disregard the presumption of innocence. Another submission concern "collective punishment", according to which persons living in the vicinity of places where survivors have been harassed have been forced to pay fines without any process of law. The Republic of Rwanda strongly disputes this and denies any official involvement. The Chamber observes that also this example does not involve the judiciary.

45. Reference has been made to statements by officials which purportedly suggest predetermination of guilt. The Chamber recalls that it follows from human rights case law that statements by representatives of authorities may raise issues in relation to the presumption of innocence.[72] One set of utterances refer to the killing by police officers of 20 detainees in May 2007. The Commissioner General is alleged to have made a statement characterising all the suspects that were killed as criminals and terrorist. The Chamber notes that the facts are disputed and that the statement was made by a person outside the judicial hierarchy. Another statement was made by the President of the High Court in connection with a conference in 2006.[73] This statement is not clear and does not express any view on the guilt or innocence of specific persons. The Chamber does not consider that these incidents prevent transfer of Kanyarukiga's case to the High Court and makes a similar finding in relation to other statements quoted by Human Rights Watch as well as cases relating to "genocidal ideology" in 2006.[74] It is recalled that many cases tried by Rwandan courts have resulted in acquittals (above, para. 37).

---

[69] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).
[70] Law No. 13/2004 of 17 May 2004 relating to the Code of Criminal Procedure (Annex G to the Prosecution Request). Article 44 further clarifies that it is the Prosecution which bears the burden of proof, and that an accused must put forward a defence only once the Prosecution has established a *prima facie* case.
[71] Prosecution Request, paras. 37(ii), 67-68; Rwanda's Brief, para. 32 (b); HRW Brief, paras. 16 (a)(ii), 41-48, 111 (b); Prosecution Response to HRW, paras. 4, 37; Rwanda's Response to HRW, paras. 28 (b), 32.
[72] For instance, *Allenet de Ribemont v. France*, Judgment of 10 February 1995, European Court of Human Rights, paras. 32-47.
[73] The statement ("the architects of the genocide literally made everyone a direct or indirect participants") formed part of a paper delivered at a conference in The Hague in December 2006. HRW Brief, para. 46.
[74] HRW Brief, paras. 47-48.

1484

(iv) Right to an Effective Defence

52. Article 14 (3) of the ICCPR, which is incorporated into Rwandan law (above, para. 16) contains the various elements of the right to defend oneself or through legal assistance. The principle is set forth in Article 18 (3) of the Rwandan Constitution.[75] Article 13 of the Transfer Law covers some aspects of this right (above, para. 29). Moreover, Article 15 provides that Defence Counsel shall have the right to enter Rwanda, move freely there, and not be subject to search, seizure, arrest or detention in the performance of their legal duties. The security and protection of defence counsel and their support staff is also guaranteed.

53. The contested issues are primarily whether these rights will be observed in practice. The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that Rwandan law affords the necessary guarantees. The Defence, HRW and ICDAA argues first, that Kanyarukiga, if transferred, may not have counsel available; second, that he may not receive legal aid; third, that the Defence may have problems in respect of travel, investigations and security or face other impediments in discharging its functions; and fourth, that witnesses may not be available or may receive insufficient protection.[76] The Chamber will address these issues separately.

(a) Availability of Counsel

54. The Prosecution and the Republic of Rwanda refer to Article 13 (6) of the Transfer Law, according to which the accused is entitled to counsel of his choice. The Defence, Human Rights Watch and the ICDAA submit that it may be difficult to ensure that Kanyarukiga has legal representation, as lawyers representing persons accused of genocide have faced threats or harassment. There are few lawyers, and many are inexperienced.[77]

55. It follows from the information provided to the Chamber that there are around 280 Rwandan lawyers in private practice, mostly in Kigali. Even though this is a limited number compared to all genocide accused in the country, the Chamber has no doubt that there will be lawyers available to represent Kanyarukiga. The Kigali Bar has expressed its willingness to defend persons transferred from the ICTR.[78] It is also possible that lawyers from abroad may be willing to represent such persons.[79] The examples of threats and harassment against Rwandan defence lawyers in connections with cases before ordinary courts do not show that lawyers, from Rwanda or elsewhere, will refuse assignments as Defence Counsel in proceedings under the Transfer Law. Whether a risk of harassment will make it difficult to carry out an efficient defence will be considered separately below under (c). Finally, the Chamber has no basis for accepting the Defence submission that Kanyarukiga will only be represented by a young or inexperienced counsel.

[75] Article 18 (3) of the Rwandan Constitution reads: "The right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs" (Annex F to the Prosecution Request).
[76] Prosecution Request, paras. 65-66; Defence Response, paras. 67-69; Prosecution Reply, paras. 44-48; Prosecution Response to HRW, paras. 53-62; Rwanda's Response to HRW, paras. 31; Kigali Bar Brief, paras. 6-18; ICDAA Brief, paras. 37-40, 55-76.
[77] Prosecution Request, 59, 63; Defence Response, paras. 66-72; Prosecution Reply, paras. 60-64; Rwanda's Brief, para. 22; HRW Brief 69-74, 84, 111 (c); Prosecution Response to HRW, paras. 53-57; Rwanda's Response to HRW, paras. 7.1, 28; ICDAA Brief, paras. 42-46; Prosecution Response to ICDAA, paras. 17-18.
[78] Rwanda's Brief, para. 22 and, more generally, Kigali Bar Brief.
[79] HRW Brief, paras. 73-74.

(b) Legal Aid

56. Article 13 (6) of the Transfer Law provides a legal framework guaranteeing the right to legal aid for indigent accused. The contentious issue is whether this right will be ensured in practice. The Prosecution and the Republic of Rwanda refer to funds having been set aside. Human Rights Watch and the ICDAA doubt that they will be made available or be sufficient.[80]

57. The Chamber notes the submissions of the two *amici* that Rwandan authorities have not disbursed funds to provide payment for legal representation of indigent accused in the past, and that the legal aid budget administered by the Rwandan Bar Association is always depleted. However, what matters in the present context, is the situation under the Transfer Law. The Ministry of Justice has made budgetary provisions of approximately $500,000 for 2008 to fund the legal aid scheme in respect of transferred cases.[81] This is a significant amount. It is not for the Chamber to venture into the question whether this amount will be sufficient. It follows from case law that there is no obligation to establish in detail the sufficiency of the funds available as a precondition for referral.[82]

58. Accordingly, the Chamber is satisfied that legal aid will be available if Kanyarukiga is transferred. Should there be future financial constraints, it would be a matter for evaluation by the monitoring mechanism (below, D).

(c) Working Conditions

59. The Defence, Human Rights Watch and ICDAA argue that Rwanda has never facilitated the travel of Defence teams, and has delayed or failed to assist them in their investigations in Rwanda. In particular, on several occasions the Defence have been unable to obtain documents or only after great effort. This is disputed by the Prosecution, the Republic of Rwanda and the Kigali Bar Association.[83]

60. Article 15 (Defence Counsel) of the Transfer Law reads as follows:

> Without prejudice to the provisions of other laws of Rwanda, Defence Counsel and their support staff shall have the right to enter into Rwanda and move freely within Rwanda to perform their duties. They shall not be subject to search, seizure, arrest or detention in the performance of their legal duties.
>
> The Defence Counsel and their support staff shall, at their request, be provided with appropriate security and protection.

---

[80] Prosecution Request, paras. 62-63; Rwanda's Brief, paras. 22-26; HRW Brief, paras. 75-78, 111 (f); Prosecution Response to HRW, paras. 58-60; ICDAA Brief, paras. 33-36, 47-54; Prosecution Response to ICDAA, paras. 13-15.

[81] *See* Rwanda's Brief, para. 25 (RwF 250 million); HRW Brief, para. 76 ($500,000); ICDAA Brief, para. 35 ($468,000).

[82] *Prosecutor v. Radovan Stanković*, Decision on Rule 11 *bis* Referral (AC), 1 September 2005, para. 21 ("Having satisfied itself that the State would supply defence counsel to accused who cannot afford their own representation, and having learned that there is financial support for that representation, the Referral Bench was not obligated in its opinion to itemize the provisions of the BiH budget").

[83] Prosecution Request, paras. 65-66; Defence Response, paras. 67-69; Prosecution Reply, paras. 44-48; HRW Brief, paras. 16 (a)(iii), 79-84, 111 (g) and (h); Prosecution Response to HRW, paras. 53-62; Rwanda's Response to HRW, paras. 7.2, 31.7; ICDAA Brief, paras. 37-40, 55-76; Kigali Bar Brief, paras. 6-18.

61. According to this provision, the Defence will be entitled to move into and within Rwanda and carry out their functions without search, seizure or deprivation of liberty, as well as being entitled to security. Without going into the factual circumstances of the various alleged incidents, the Chamber accepts that there have been instances of harassment, threats or even arrest of lawyers for accused charged with genocide. On the other hand, the examples relate to proceedings before the ordinary courts. Defence teams at the ICTR have been able to work in Rwanda, even though they have encountered some problems.[84] Should such situations occur after transfer under Rule 11 *bis*, the Defence will have an explicit legal basis for bringing the matter to the attention to the High Court or the Supreme Court. These courts will be under a duty to investigate the matter and provide a remedy in order to ensure an efficient defence. If the Defence team is prevented from carrying out its work effectively, this will be a matter for the monitoring mechanism and may lead to revocation of the transfer order. Finally, for the reasons given above (para. 57), the Chamber is not persuaded by the submission that the travel and investigation budget will be insufficient.[85]

62. Other alleged impediments faced by the Defence in connection with its investigations are generally formulated, and the Chamber is not convinced that they prevent transfer. Some of them may be explained by communication problems, lack of precision in the requests, or more generally administrative delays or lack of resources.[86] However, the Chamber accepts the submission that many ICTR Defence teams have been unable to obtain documents from Rwandan authorities, or have received them only after considerable time.[87] Similarly, there are examples of Defence counsel having difficulties in meeting detainees.[88] Such incidents are not in themselves sufficient to prevent transfer under Rule 11 *bis*. However, together with other factors they illustrate that the working conditions for the Defence may be difficult. Together with other factors discussed below under (d), this may have a bearing on the fairness of the trial.

(d) Availability and Protection of Witnesses

63. The Prosecution, the Republic of Rwanda and the Kigali Bar Association submit that witnesses will be available and protected under the specific regime established under the Transfer Law. Allegations to the contrary are generalized and unfounded. The Defence, Human Rights Watch and ICDAA argue that witnesses for persons accused of genocide are reticent to testify because they are afraid of being accused of harbouring "genocidal ideology". Inadequate procedures exist to protect witnesses. Defence witnesses in particular

[84] The factual circumstances of some of the purported problems are disputed, and the Chamber does not fully accept the description of all events. For instance, Léonidas Nshogoza (ICDAA Brief, para. 57), a lawyer who was then serving as investigator for an ICTR Defence team, was on 11 February 2008 indicted by the ICTR and charged with contempt of court. The descriptions of the incidents involving Defence Counsel Callixte Gakwaya (ICDAA Brief, para. 66) and Defence Minister Marcel Gatsinzi (HRW Brief, para. 82) are also not complete.

[85] ICDAA Brief, paras. 55-56. Neither is the Chamber convinced by the purported lack of specific funding of security for Defence teams (ICDAA, paras. 59-60).

[86] Some of these factors are mentioned as possible explanations for delays in Rwanda's Response to HRW, paras. 31.7.

[87] HRW Brief, paras. 79, 81; ICDAA Brief, para. 72. One example is judicial antecedents, for instance guilty pleas or judgments involving Prosecution witnesses.

[88] HRW Brief, paras. 79, 81; ICDAA Brief, para. 71. The illustrations in ICDAA Brief, paras. 69 (Defence Counsel followed by government officials during investigations) and 70 (Defence Counsel photographed while interviewing a witness) are worrying. However, such incidents do not appear sufficiently widespread to prevent transfer.

face threats and harassment, and witnesses residing outside Rwanda will be unwilling to testify.[89]

64. The Chamber recalls that providing physical protection to witnesses and their family members who may be in danger as a result of their testimony may positively influence their availability. This may affect an accused's right to obtain the attendance of witnesses on his behalf and examine them under the same conditions as witnesses against him. Protection of witnesses before, during and after their testimony is therefore important to the fairness of the trial.[90]

65. Article 14 of the Transfer Law states that in cases transferred from the ICTR, the High Court "shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence". The travelling to Rwanda of witnesses residing abroad shall be facilitated, and they shall have immunity from search, seizure, arrest or detention. According to Article 145 of the Code of Criminal Procedure, courts may order closed sessions where a public hearing could be detrimental to public order and good morals, and they may take other measures that may reasonably limit the right to a public trial when necessary for the protection of witnesses.[91] Consequently, the Republic of Rwanda has a legal framework for the protection of witnesses and has adopted provisions similar to those in the Tribunal's Rules.

Witnesses in Rwanda

66. Based on interviews, Human Rights Watch points out that the Rwandan provisions concerning witness protection do not appear to be widely known by legal practitioners and judges and hence not applied.[92] The Chamber notes that the interviews were carried out in 2005, 2006 and 2007 and related to a law which was recently adopted - in 2004 – and is applicable in the ordinary courts. Kanyarukiga's case, if transferred, will be conducted under the Transfer Law of 2007, which in Article 14 contains explicit and elaborate rules about protection. Lawyers, prosecutors and judges who will be engaged in such proceedings must be expected to know that provision. It will be for the parties to raise concerns, if any, and exhaust the witness protective mechanisms available in those proceedings, which would be monitored in case of transfer (below, D). In the Chamber's view, limited knowledge of witness protection under a previous general system is not a reason to exclude transfer under the specific regime established by the Transfer Law. Finally, the submissions do not show that Rwandan judicial officials will disregard witness protection orders.[93]

---

[89] Prosecution Request, paras. 41-42, 69; Defence Brief, paras. 56-66; Prosecution Reply, para. 65; Rwanda's Brief, paras. 27; HRW Brief, paras. 15 (i), 16 (c), (d), (e), 25-40, 83-105, 111 (b), (i), (j) and (k); Prosecution Response to HRW, paras. 4, 21-36, 63-66; Rwanda's Response to HRW, paras. 31.2-31.6; ICDAA Brief, paras. 80-102; Prosecution Response to ICDAA, paras. 21-24; Kigali Bar Brief, paras. 19-23.

[90] *Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (TC), 14 September 2005, paras. 49-50.

[91] Law No. 13/2004 Relating to the Code of Criminal Procedure (Annex G to the Prosecution Request).

[92] HRW Brief, para. 26 refers to Article 128 of *Loi No. 15/2004 portant modes et administration de la preuve*, which enables Rwandan courts to take measures to protect witnesses who provide information or cooperate with the prosecuting authorities.

[93] A statement by the Rwandan Minister of Justice in 2006 to the effect that witness protection is not appropriate in the Rwandan context (HRW Brief, para. 26) predates the adoption of the Transfer Law. The Chamber's attention has also been drawn to a decision by the Higher Instance Court of Gasabo, which included names of protected witnesses (HRW Brief, para. 28). However, one such decision does not form a basis to conclude that officials will not respect orders to be given under the Transfer Law. (The decision ordered the detention of Leonard Nshogoza, a Defence investigator charged at the ICTR with contempt of court, see footnote 84 above).

67. Human Rights Watch and ICDAA argue that the Rwandan witness protection service will be unable to provide adequate protection, as it lacks resources. The funding has been left to foreign donors, and only 16 staff members serve the entire country.[94] The Chamber observes that about 900 witnesses have been subject to protection since the service was established.[95] This shows that the witness protection service has experience. There are presently four staff members in Kigali, where the transfer proceedings will take place. Capacity does not only depend on the number of employees but also on the priority given to particular cases, based on a concrete evaluation. Finally, a mere risk that future funding may not be available is not a sufficient reason to deny transfer.[96]

68. The Defence, Human Rights Watch and ICDAA refer to instances of threats, harassment and violence against witnesses living in Rwanda. It is argued that following testimony for the defence teams in ordinary courts, witnesses have been accused in Gacaca proceedings. Furthermore, in about ten cases, persons who testified for the Defence before the Tribunal were purportedly arrested, re-arrested, subjected to worse conditions of incarceration or otherwise harassed after returning to Rwanda. The Prosecution and Rwanda disputes the factual description of some of the event, whereas others are sporadic incidents which do not prevent transfer.[97]

69. In the Chamber's view, the submissions show that there have been instances of harassment of witnesses. However, it appears that the large majority of witnesses have testified without such consequences. Similarly, although some persons who have given evidence before the Tribunal have reported problems, hundreds of Prosecution and Defence witnesses have come from Rwanda and returned without difficulties. Under these circumstances, the Chamber does not find that witnesses will, in general, face risks if they testify in transfer proceedings. This said, no judicial system, be it national or international, can guarantee absolute witness protection.[98] Should incidents occur, it will be for the High Court or the Supreme Court to initiate investigation, clarify the facts and ensure the necessary protection. If this is not done, or if the measures taken are insufficient, it would be a matter for evaluation by the monitoring mechanism (below, D).[99]

70. In this connection, the Chamber has also taken into account that the Rwandan witness protection service is unable to provide protection alone. According to Human Rights Watch and ICDAA, the service has to refer all cases of threats to the local police. The witness protection service forms part of the national prosecutor's office. According to the two *amici*, this makes it unlikely that Defence witnesses will seek the assistance of that service.[100] The Chamber considers that referral of cases by the witness protection service to other institutions, such as the police, does not necessarily mean that the service is inadequate. This

---

[94] HRW Brief, paras. 27 and 85; ICDAA Brief, para. 83.

[95] HRW Brief, para. 85; Prosecution Response to HRW, para. 64.

[96] According to Human Rights Watch, the funding for the first three quarters of 2007 amounted to $132,000 (HRW Brief, para. 85).

[97] Defence Response, paras. 63-66; HRW Brief, paras. 89-109; Prosecution Response to HRW, paras. 67-78; Rwanda's Response to HRW, paras. 11-12, 15-16, 31; ICDAA Brief, paras. 80-93.

[98] *The Prosecutor v. Gojko Janković*, Decision on Rule 11*bis* Referral (AC), 15 November 2005, para. 49.

[99] Human Rights Watch has referred to specific incidents where allegation of ill-treatment did not lead to investigations (HRW Brief, paras. 90-94). This is certainly a matter of concern. However, the incidents do not reveal a general pattern and does not in the Chamber's view prevent transfer under the specific regime established by the Transfer Law.

[100] HRW Brief, paras. 27, 86, 87; ICDAA, paras. 83-86; Prosecution Response to HRW, para. 65. The two *amici* refer not only to the police but also to "political authorities". It is unclear what is meant by that.

said, the link between the witness protection service and the police may, in the Rwandan context, reduce the willingness of some potential Defence witnesses to testify. The fact that the national prosecutor's office is responsible for the protection of all witnesses may also be noted by fearful witnesses.

71. Witness protection concerns are also related to the issue of "genocidal ideology", which has been extensively referred to in some of the submissions. The Constitution refers to the fight against "the ideology of genocide".[101] Article 13 does not use this concept but states that revisionism, negationism and trivialization of genocide is punishable by law, and the 2003 Genocide Law prohibits the negation of genocide.[102] This is in itself legitimate and understandable in the Rwandan context. The Chamber recalls that many countries criminalise the denial of the Holocaust, while others prohibit hate speech in general.[103] In the present case, it is argued that an expansive interpretation and application of the prohibition of "genocidal ideology" will lead to Defence witnesses not being willing to testify, as they are afraid of being accused of harbouring this ideology.

72. The material indicates that in several instances, the concept has been given a wide interpretation.[104] There are examples of persons being too afraid to appear as witnesses for persons who allegedly were innocent. On the other hand, many persons living in Rwanda have testified for the Defence in proceedings there. In addition, the Transfer Law provides specific rules and remedies in the field of witness protection (above, para. 65). However, the Chamber cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring "genocidal ideology".

73. Taking into account the totality of the factors mentioned above, the Chamber accepts that the Defence may face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. This may affect the fairness of the trial.

Witnesses Outside Rwanda

74. Defence, Human Rights Watch and ICDAA dispute that the Defence will be able to obtain witnesses residing outside Rwanda. According to the Prosecution and the Republic of Rwanda, this fear is unfounded.[105] The Chamber notes Article 14 (2) and (3) of the Transfer Law:

---

[101] Second preambular paragraph and Article 9 (1) of the Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[102] Law No. 33 *bis*/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes. According to Article 4, imprisonment between 10 and 20 years may be imposed on "any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence".

[103] As pointed out by the Prosecution (Response to HRW, para. 29), it follows from human rights case law that prohibiting negation or revision of the Holocaust does not constitute a violation of freedom of expression under Article 10 of the European Convention of Human Rights and Article 19 of the ICCPR.

[104] HRW Brief, paras. 30-40 and 99 (arguing that the concept has been considered to cover "a broad spectrum of ideas, expression, and conduct, often including those perceived as being in opposition to the policies of the current government" and "questioning the legitimacy of detention of a Hutu"; and mentioning lists of hundreds of persons and organizations considered guilty of holding or disseminating "genocidal ideology", including Care International, BBC and Voice of America).

[105] Defence Brief, para. 61; HRW Brief, paras. 38-40, Prosecution Response to HRW, paras. 76-78; 103-105; Rwanda's Response to HRW, paras. 31.18 and 31.19; ICDAA Brief, paras. 94-102.

1478

> In the trial of cases transferred from the ICTR, the Prosecutor General of the Republic shall facilitate the witnesses in giving testimony including those living abroad, by the provision of appropriate immigration documents, personal security as well as providing them with medical and psychological assistance.
>
> All witnesses who travel from abroad to Rwanda to testify in the trial of cases referred from the ICTR shall have immunity from search, seizure, arrest or detention during their testimony and during their travel to and from the trials. The High Court of the Republic may establish reasonable conditions towards a witness's right of safety in the country. As such there shall be determination of limitations of movements in the country, duration of stay and travel.

75. This provision provides a legal framework for witnesses residing abroad, including their travel, security, immunity and assistance. The Chamber notes in particular that the witnesses shall have immunity from arrest and detention in connection with testimony in Rwanda. The Republic of Rwanda has submitted the provisions on safe conduct of witnesses will be strictly observed in all proceedings involving transferred cases.[106] The Chamber accepts this statement but is also persuaded by the submissions by the Defence, Human Rights Watch and ICDAA that many Rwandans in the diaspora will be afraid to testify in Rwanda.[107] Experience at the ICTR confirms such fear.

76. Leaving aside how well-founded such fear is, it has to be taken into account when evaluating the availability of Defence witnesses. The Kanyarukiga Defence states that most of its witnesses are residing abroad. This is not unusual at the ICTR.[108] Even assuming that some of them will testify in Kigali, it will undermine the fairness of a trial there if Kanyarukiga is unable to call a sufficient number of witnesses to present an efficient defence.

77. In facing the problem of unwilling witnesses, the ICTR has issued subpoenas based on Article 28 of its Statute, which requires states to cooperate with the Tribunal in securing

---

[106] Rwanda's Response to HRW (para. 31.19, quoted below in footnote 107). *See* on the other hand ICDAA Brief, para. 100 about "safe conduct" ("*sauf-conduit*").

[107] ICDAA Brief, para. 101 ("ICDAA's conclusion, based on its members' experience, is that almost no witness from abroad will be willing to go back to Rwanda in order to testify at the request of a defence team."); HRW Brief, para. 38 ("The right to present witnesses is seriously undermined by the fact that many Rwandan witnesses living abroad are unwilling to testify in Rwandan courts"). Quoting a statement by the Minister of Justice in February 2007 about how immunity for witnesses "will be a step towards their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest", Human Right Watch continues (para. 39): "This comment, widely circulated among Rwandans in the diaspora, served only to confirm the fears of many Rwandans that the immunity guaranteed by the transfer law was in fact a falsehood to facilitate their later arrest and forced return to Rwanda". In its Response to HRW (para. 31.19), Rwanda does not dispute the accuracy of the Minister's statement but submits that "the information as to the whereabouts of fugitives has always been available, yet not each of the fugitives has been tracked down and captured yet. More importantly, some of the fugitives have been removed from *Interpol red notice* simply because the ICTR needed them as witnesses in various cases. This has always been done even without any legally binding provision. We submit that the provisions on safe conduct of witnesses shall be strictly observed in all proceedings involving transferred cases. Thus there should be no room for speculation or worries as expressed under paragraph 39 and 40 of the HRW Brief."

[108] Defence Response, para. 61 ("Or, la plupart des témoins de la défense de Kanyarukiga sont localisés à l'étranger et ceux de l'interieur par peur des représailles risquent de se retracter"). *See also* HRW Brief, para. 38 ("One experienced defence lawyer estimated that as many as 90 percent of the witnesses called by his clients and other accused persons reside outside Rwanda."). In its Response to HRW, Rwanda challenges the reliability of this estimate (para. 31.18). Leaving aside the exact percentage of Defence witnesse residing abroad in the various trials, the Chamber accepts that it is generally high and has no basis for disputing the Kanyarukiga Defence statement about its witnesses.

the attendance of witnesses. The Republic of Rwanda will not have this remedy available. Furthermore, the Chamber is not aware that Rwanda has taken any steps to conclude conventions about mutual assistance in criminal matters.[109] This will make it difficult to ensure the attendance of witnesses in Kigali.

78. The Prosecution and the Republic of Rwanda submit that witnesses residing abroad may be heard by video-link conference, and that the necessary facilities exist in Rwanda.[110] The Chamber accepts that there is such equipment in Rwanda, and that it is available in relation to unwilling, including fearful, witnesses. It is also recalled that there is extensive case-law accepting this procedure, under certain conditions, both in domestic jurisdictions and at the ICTR. In Tribunal case law, genuinely-held fear has been considered as a sufficient reason to hear the testimony of witnesses residing outside Rwanda by video-link instead of requiring their presence in the courtroom.[111]

79. This said, it would be an unprecedented situation if most or all witnesses for one side were to be heard by video-link. It is preferable that witnesses be heard in court.[112] The testimony of witnesses heard through electronic media runs the risk of being less weighty if the quality of the transmission impairs the court's assessment of the witness. The physical presence of witnesses makes it easier for the bench to assess their credibility, and also for the parties, including the accused, to follow the evidence and the proceedings. Video-link transmission cannot be equated with presence, as there is not the same visual interaction. In relation to key witnesses, the use of video-link may, according to the circumstances, raise concerns.[113]

---

[109] In *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), the Appeals Chamber accepted (para. 26) that the Referral Bench had taken into account that Bosnia and Herzegovina had ratified the European Convention on Mutual Assistance in Criminal Matters when considering the steps taken by that country to promote the obtaining of witnesses and evidence. Reference was also made to Security Council resolution 1503 (2003), which obliges the international community to assist national jurisdictions in improving their capacity to prosecute cases transferred from the ICTY and the ICTR (operative paragraph 1). According to the Appeals Chamber, "this instruction implicitly includes cooperation with respect to witnesses" (*id.*). In the present case, the Chamber is not convinced that this in itself will be sufficient to ensure the availability of Defence witnesses. (About availability of witnesses, *see also The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 85.)

[110] Rwanda's Brief, para. 20 (courtroom equipped with "Audiovisual recording"); Prosecution Response to HRW, paras. 66 and 78, quoting *Amicus Curiae* Brief of Rwanda, submitted on 10 January 2008 in the Rule 11 *bis* proceedings in *Prosecutor v. Hategekimana* (p. 7: "Audiovisual recording: There are video-link facilities which will be used to receive testimony of any witness residing abroad who may be unable or unwilling to physically appear in court"). *See also Prosecutor v. Yussuf Munuyakazi*, T. 24 April 2008 p. 70, where Counsel for Rwanda confirmed that there were no practical or procedural obstacles limiting courts to hear witnesses by video-link.

[111] About fear, *see The Prosecutor v. Bagosora et al.*, Decision on Video-Conference Testimony of Kabiligi Witness Delta and to Hear Testimony in Closed Session (TC), 1 November 2006, paras. 2-3; Decision on Video-Conference Testimony of Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session (TC), 19 October 2006, paras. 2-5; Decision on Video-Conference Testimony of Kabiligi Witnesses KX-38 and KVB-46 (TC), 5 October 2006, paras. 2-6.

[112] This has been a relevant factor in ICTR case law. *See Prosecutor v. Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15 (reiterating "the general principle, and the Chamber's strong preference, that most witnesses should be heard in court"); Decision on Testimony by Video-Conference (TC), 20 December 2004, para. 4 (emphasizing "the general principle, articulated in Rule 90 (A), that 'witnesses, shall, in principle, be heard directly by the Chamber'"); Decision on Testimony of Witness Amadou Deme by Video-Link (TC), 29 August 2006, para. 3.

[113] *The Prosecutor v. Zigiranyirazo*, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 19 ("the Appeals Chamber accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest"). *See also The Prosecutor v. Zejnil Delalic et al.*, Decision on the Motion to

80. Furthermore, human rights case law has established the principle of equality of arms, which is one aspect of the right to a fair trial. It implies that each party must be afforded a reasonable opportunity to present his or her case – including evidence – under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party.[114] The hearing of most Prosecution witnesses in the courtroom while most of the Defence witnesses either refuse to give evidence or testify by video-link would not be in conformity with this principle. In the Chamber's view, there is a real risk that this will be the situation, even if the trial is subject to monitoring.

81. The Chamber concludes that it is not satisfied that Kanyarukiga will be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial if his case is transferred.

(v) Double jeopardy

82. According to the Defence and Human Rights Watch, the Rwandan legal system provides no protection against double jeopardy as guaranteed by the ICCPR and the Statute (*non bis in idem*). Persons tried before conventional courts may subsequently be brought before the Gacaca jurisdictions. This follows both from legislation and practice. The Prosecution submits that the risk of double jeopardy is unsupported and refers to the Transfer Law.[115]

83. The Chamber recalls that ICCPR Article 14 (7) states that no-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Similarly, it follows from Article 9 (1) of the ICTR Statute that no person "shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statute for which he or she has already been tried by the Tribunal". Under Rwandan law, however, it follows from the 2004 Gacaca Law that a person may be tried first by an ordinary court and subsequently by a Gacaca jurisdiction. According to Article 93, the Gacaca Courts of Appeal are the only courts competent to review judgments in such cases.[116] Human Rights Watch has provided examples of accused who were first acquitted by an ordinary court and subsequently brought before a Gacaca jurisdiction.

Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference (TC), 28 May 1997, para. 18.

[114] *See*, for instance, the following judgments of the European Court of Human Rights: *Delcourt v. Belgium*, Judgment, 17 January 1970, Series A, No. 11, paras. 27-38, in particular para. 28; *Bönisch v. Austria*, Judgment, 6 May 1995, Series A, No. 92, paras. 28-35, particularly para. 32 (referring to the need for equal treatment as between the hearing of a Prosecution witness and a Defence witness); *Dombo Beheer B.V. v. The Netherlands*, Judgment, 27 October 1993, Series A, No. 274, paras. 30-35, in particular para. 33 ("each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent").

[115] Defence Response, para. 46; HRW Brief paras. 15 (b), 55-60, 111 (c); Prosecution Response to HRW, paras. 45-48.

[116] Article 93 of the 2004 Gacaca Law provides: "(1) The judgement can be subject to review only when: (1) the person was acquitted in a judgement passed in the last resort by an ordinary court, but is later found guilty by the Gacaca Court; (2) the person was convicted in a judgement passed by an ordinary court, but is later found innocent by the Gacaca court ... The Gacaca Court of Appeal is the only competent Court to review judgements passed under such conditions."

84. It is not the task of the Chamber to assess the general implementation in Rwandan law of the protection against double jeopardy but to determine whether Kanyarukiga, if transferred, will be protected against a violation of this principle. The Transfer Law, which according to Article 1 regulates the transfer of cases, establishes the High Court and the Supreme Court as the only courts to hear such cases. Article 2 specifies that the High Court "shall be the competent court to conduct [in] the first instance" cases that are transferred [n]otwithstanding any other law to the contrary". Article 25 states that in the event of any inconsistency between the Transfer Law and another law, the former shall prevail. Finally, Article 13 of the Transfer Law provides that it shall apply without prejudice to other rights ("*sous reserve d'autres droits*") guaranteed in the ICCPR, which includes the prohibition of double jeopardy (above, para. 83). According to Article 190 of the Constitution, international conventions ratified by Rwanda is more binding than other laws (para. 16). In view of these provisions, the Chamber is satisfied that Kanyarukiga, if transferred, will not run the risk of double jeopardy.[117]

(vi) Arrest and Conditions of Detention

85. Case law has established that conditions of detention in a national jurisdiction, whether pre- or post-conviction, are a matter that touches upon the fairness of that jurisdiction's criminal justice system.[118] By way of introduction, the Chamber notes that Rwanda has ratified and incorporated several human rights instruments, including the ICCPR, which prohibits unlawful and arbitrary deprivation of liberty (Article 9), requires that all persons deprived of their liberty shall be treated with humanity and respect (Article 10), and outlaws torture and cruel, inhuman or degrading treatment or punishment (Article 7). The Constitution establishes the right to physical and mental integrity and provides that no-one shall be subjected to torture, physical abuse or cruel, inhuman or degrading treatment (Article 15). The liberty of persons is guaranteed by the State (Article 18).[119]

86. The Defence, Human Rights Watch and ICDAA raise concerns in relation to unlawful detention and inhuman conditions of detention, as well as torture. The Prosecution, the Republic of Rwanda and the Kigali Bar Association dispute this. Before considering these issues separately, the Chamber recalls that the ICTY has used the following yardstick to evaluate potential risks confronting an accused if transferred:

> First, the Bench must examine whether any suspicions of threats to the accused's safety are substantiated and based on fact. If so, the Bench must then determine whether the authorities of the state of referral would be able to effectively safeguard the accused against any attacks on his life and limb.[120]

---

[117] This conclusion means that the Chamber accepts the Prosecution submissions. In the present case, Rwanda has not explicitly addressed the issue of double jeopardy but it follows from its Response to HRW (para. 14) that it "re-iterates the Prosecutor's position, in its entirety, on all issues pertaining to legal framework as well as jurisdiction of Rwandan Courts". Furthermore, during the oral hearing in *The Prosecutor v. Munyakazi*, Counsel for Rwanda confirmed that a case dealt with under the Transfer Law cannot be heard by the Gacaca jurisdictions, *see* T. 24 April 2008 p. 66.

[118] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11*bis* Referral (AC), 1 September 2005, para. 34, as well as Referral Bench practice (*see*, for instance, footnote 120 below).

[119] Rwandan Constitution of 2003 (Annex F to the Prosecution Request).

[120] *The Prosecutor v. Milorad Trbić*, Decision on Referral of Case under Rule 11*bis* with Confidential Annex (Referral Bench), 27 April 2007, para. 40, relying on *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B (Referral Bench), 5 April 2007, para. 64.

(a) Unlawful and Arbitrary Arrest

87. The Prosecution and the Republic of Rwanda argue that Kanyarukiga will be lawfully detained if transferred. Human Rights Watch and ICDAA express doubts in this regard, referring to examples of lengthy pre-trial detention in Rwanda, even without an arrest warrant, before the ordinary courts and Gacaca jurisdictions.[121] The Chamber recalls that Kanyarukiga was arrested on the basis of an international arrest warrant and has been lawfully detained by the ICTR. If transferred, it will be on the basis of the most recent Indictment, issued by the ICTR on 14 November 2007 (above, paras. 2 and 3). According to Article 5 of the Transfer Law, his arrest and detention in Rwanda shall be regulated in accordance with the Code of Criminal Procedure, which has provisions about appearance before a judge.[122] Consequently, there is an adequate legal framework in place to prevent unlawful and arbitrary detention.

88. The Chamber is well aware of the criticism concerning unlawful and lengthy detention both in respect of Gacaca courts and the ordinary courts. However, Kanyarukiga will be detained under the legal regime established by the Transfer Law. Any irregularities or lengthy pre-trial detention may be brought to the attention of the High Court, the Supreme Court and the monitoring mechanism (below, D). Consequently, the Chamber does not find that the risk of unlawful or arbitrary detention prevents his transfer.

(b) Conditions of Detention

89. The Defence, Human Rights Watch and ICDAA submit that it is unclear whether the detention conditions before, during and, in case of a conviction, after trial will comply with the ICCPR and other internationally recognised standards. According to the Prosecution, the Republic of Rwanda and Kigali Bar Association, these fears are unfounded. The conditions of detention will be subject to inspection.[123]

90. Some of the submissions refer to material showing that the general detention conditions in Rwanda are below international standards, for instance due to overcrowding, lack of health care and shortage of food. The issue for the Chamber is whether Kanyarukiga will be subjected to such conditions. Article 23 (1) and (2) of the Transfer Law states:

> Any person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43 /173 of 9 December 1998.
>
> The International Committee of the Red Cross or an observer appointed by the President of the ICTR shall have the right to inspect the conditions of detention of persons transferred to Rwanda by the ICTR and held in detention. The International Committee of the Red Cross or

[121] Prosecution Request, para. 78; Defence Reply, para. 88; Rwanda's Brief, para. 49-52; HRW Brief, paras. 16 (f), 106-109, 111 (i); Prosecution Response to HRW, paras. 79-80; ICDAA Brief, paras. 104-117; Prosecution Response to ICDAA, para. 25.

[122] *See* Articles 93-100 of the Code on Criminal Procedure concerning "preventive detention" (Annex G to the Prosecution Request) and Rwanda's Brief, paras. 50-51.

[123] Prosecution Request, paras. 78-79; Defence Brief, paras. 30-32, 87-90; Rwanda's Brief, paras. 28-30, 52; HRW Brief, paras. 15 (c), 16 (g), 61-67, 110, 111 (d) and (m); Prosecution Response to HRW, paras. 49-52; Rwanda's Response to HRW, para. 35; ICDAA Brief, paras. 118-126; Prosecution Response to ICDAA, paras. 25-31; Kigali Bar Brief, paras. 24-27.

the observer appointed by the ICTR shall submit a confidential report based on the findings of these inspections to the Minister of Justice of Rwanda and to the President of the ICTR.[124]

91. This provision institutes a special regime for detainees transferred from the ICTR. The question is how it will be implemented in practice. It follows from the submissions of the Republic of Rwanda that a new prison has been built in Mpanga. It has a special wing with 73 cells built to international standards. Budgetary appropriations have been earmarked and are available to complete the partitioning of the cells to meet requirements set by the ICTR. The Mpanga prison is situated in Nyanza, about two hours drive from Kigali. During trial, the accused will be detained at a custom-built remand facility at the Kigali Central Prison, in close proximity to the High Court and the Supreme Court. It contains twelve cells and six toilets. Each room is equipped with a bed, beddings, closet, reading table and a chair.[125]

92. Based on this information, the Chamber is not persuaded by the concerns regarding the physical conditions of the detention facilities in which Kanyarukiga will be placed, should he be transferred. Even though further construction work is required in Mpanga, some time would elapse before transfer could take place.[126] Any remaining problems at the time of transfer can be drawn to the attention of the monitoring mechanism under Rule 11 *bis* (D) (iv) or to inspectors to be appointed under Articles 23 (2) of the Transfer Law.

93. The remaining issue is whether Kanyarukiga, if transferred, runs any risk of torture, and cruel, inhuman or degrading treatment or punishment.[127] The Chamber does not consider it likely that such acts will be committed under the special regime established by the Transfer Law. Furthermore, Article 23 (2) provides for inspection by the International Red Cross Committee (ICRC) or an observer appointed by the ICTR President. Should ill-treatment occur, it would also be a matter for the monitoring mechanism under Rule 11 *bis* (D)(iv). This may lead to revocation of any transfer decision under Rule 11 *bis* (F) and (G).

(c) Life Imprisonment with Solitary Confinement

94. The Defence and Human Rights Watch refer to the law which in 2007 abolished capital punishment (the Death Penalty Law) and replaced it with life imprisonment or "life imprisonment with special provision".[128] They argue that Kanyarukiga may, if convicted to life imprisonment, risk prolonged solitary confinement in breach of Article 7 of the ICCPR. The Prosecution and the Republic of Rwanda dispute that the "special provision" clause is applicable under the Transfer Law. Prolonged isolation will therefore not occur.[129]

95. It is common ground that prolonged solitary confinement may constitute a violation of Article 7 of the ICCPR and other instruments prohibiting torture and inhuman and degrading

---

[124] Some minor stylistic changes have been made in the English translation of the text. Furthermore, Article 23 (3) and (4) provide for notification and investigation if an accused dies or escapes from prison.
[125] Rwanda's Brief, paras. 28-29.
[126] Work remained in Mpanga prison when visited by a researcher from Human Rights Watch in November 2006 (HRW Brief, para. 110). It is the Prosecution's position that both institutions are commensurate with internationally accepted standards (Prosecution Response to ICDAA, para. 27). According to Rwanda, the ICTR Prosecutor found the Kigali Prison facilities acceptable in October 2007 (Rwanda's Brief, para. 29).
[127] Defence Brief, paras. 87-88; ICDAA Brief, paras. 127-133.
[128] Organic Law No. 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty (Annex F to the Prosecution Request). *See* above, para. 25.
[129] Defence Response, paras. 33-35; HRW Brief, paras. 61-67 (referring to ICCPR Article 7); Prosecution Response to HRW, in particular paras. 49-50; Rwanda's Response to HRW, para. 35.2.

treatment or punishment.[130] The question is whether Kanyarukiga, if transferred, may be subjected to such isolation. Article 3 of the law which in 2007 abolished capital punishment, states that the death penalty is substituted "by life imprisonment or life imprisonment with special provision". According to Article 4, the latter means that "a convicted person is kept in isolation". On the other hand, Article 21 of the Transfer Law provides that "life imprisonment" shall be the heaviest penalty, without any reference to imprisonment "with special provision".

96. The Chamber is not aware of any case law in Rwanda concerning the relationship between these two laws. It notes that the Transfer Law, which could arguably be seen as *lex specialis* in the field of transfer, states in Article 25 that its provisions shall prevail in the event of any inconsistency with other legislation. On the other hand, the Death Penalty Law, which was adopted a few months after the Transfer Law, is *lex posterior* and provides categorically in Article 9 that "[a]ll legal provisions contrary to this Organic Law are hereby repealed". Although these two laws may be interpreted to the effect that "life imprisonment with special provision" does not apply within the field of application of the Transfer Law, the legal situation is nevertheless unclear.[131] The Chamber finds that there is a risk that Kanyarukiga, if transferred and convicted, may be subject to isolation and is therefore not satisfied that he will be protected against isolation.

(vii) Individual Circumstances

97. The Defence invokes Kanyarukiga's personal circumstances, pointing out that he voluntarily gave himself up to the ICTR on condition that he would not be transferred to Rwanda, that transfer will delay his trial, that his property has been taken or destroyed, that there is a conspiracy against him, and that close relatives have disappeared.[132] The Chamber has considered these submissions but does not find that they prevent transfer of his case.

D. Monitoring

98. If the request for transfer is granted, the Prosecutor may, according to Rule 11 *bis* (D)(iv), send observers to monitor the proceedings in Rwandan courts. As mentioned above (in particular paras. 73, 81 and 96), the Chamber has some concerns that prevent transfer. The Chamber will nevertheless address the issue of monitoring, as it has rejected some of the objections against transfer based on the existence of a satisfactory monitoring system.

---

[130] Rwanda's Response to HRW, para. 35.2 ("We agree with HRW that prolonged solitary confinement may be in breach of certain provisions of the Convention against torture. We submit, however, that there is no prolonged solitary confinement in Rwandan prisons"). The ICCPR Human Rights Committee has adopted General Comment 20, para. 6 ("The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7"). Similar statements have been made in connection with the Committee's consideration of reports from states under Article 40 and individual communications under the Optional Protocol. Under the European Convention on Human Rights, the Court have established similar principles in several cases, for instance *Ramirez Sanchez v. France*, Judgment, 4 July 2006, paras. 120-150, in particular para. 136 ("substantive reasons must be given when a protracted period of solitary confinement is extended") and 145 ("The Court nevertheless wishes to emphasise that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely. Moreover, it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement"). In the present case, the parties have not addressed these issues.

[131] The lack of clarity was illustrated during the oral hearing in *The Prosecutor v. Yussuf Munyakazi*, T. 24 April 2008 pp. 63, 66-67, 76-77.

[132] Defence Response, paras. 83-86, 95-101.

99. The Prosecutor's request was based on monitoring of national proceedings. The Republic of Rwanda submits that it accepts this. ICDAA argues that monitors should not be selected by the Prosecution but by an independent organisation in order to ensure that they represent the interests of all interested parties. It is also of the view that the proposed monitoring process will be insufficient.[133]

100. The Chamber recalls that Rule 11 *bis* (D)(iv) confers a substantial amount of discretion on the Prosecutor in determining whether to send monitors on his behalf and how such monitoring should be conducted.[134] He has approached the African Commission on Human and People's Rights, which has accepted to monitor proceedings in transferred cases.[135] Such an arrangement falls squarely within the Prosecutor's discretion. The Chamber notes that the Commission is an independent organ established under the African Charter on Human and Peoples' Rights and has no reason to doubt that the Commission has the necessary qualifications to monitor trials.

101. Rwandan legislation includes provisions about monitoring. Article 19 of the Transfer Law states that the ICTR Prosecutor shall have the right to designate individuals to observe the progress of transferred cases. The observers shall have access to court proceedings, documents and records relating to the case, as well as access to all places of detention.[136] The Republic of Rwanda has expressed its commitment to facilitating the work of the monitors.[137]

102. According to Rule 11 *bis* (F) and (G), the Prosecutor may, before a transferred person has been found guilty or acquitted by a national court, request the Chamber to revoke the transfer order and make a formal request that the State concerned defer to the competence of the ICTR. In conformity with the duty to co-operate with the Tribunal (Article 28 of the ICTR Statute), the State shall accede to such a request without delay. The counterpart in Rwandan law is Article 20 of the Transfer Law, which provides that an accused shall be promptly surrendered to the ICTR if a transfer order is revoked. The Republic of Rwanda has committed itself to complying with any revocation order.[138]

103. The Chamber considers the suggested monitoring system satisfactory and has taken this into account in its deliberations. This has led to the rejection of some of the objections against transfer. However, monitoring will not, in the Chamber's view, solve the problems relating to availability and protection of witnesses and not eliminate the risk of solitary confinement in case of life imprisonment.

---

[133] Prosecution Request, paras. 75-79; Rwanda's Brief, paras. 41-45; ICDAA Brief, paras. 134-148; Prosecution Response to ICDAA, paras. 39-47.

[134] *The Prosecutor v. Radovan Stankovic*, Decision on Rule 11 *Bis* Referral (AC), 1 September 2005, paras. 50, 53, 57.

[135] Letter of 2 June 2006 from the President of the African Commission on Human and People's Rights to the ICTR Prosecutor (Annex M to the Prosecution Request).

[136] Places of detention are not only subject to monitoring under Article 19, but also inspection in pursuance of Article 23 (*see* above para. 90 concerning The International Committee of Red Cross or an observer appointed by the ICTR President.

[137] Rwanda's Brief, para. 42.

[138] Rwanda's Brief, para. 44.

1470

E. Concluding Remarks

104. The Chamber concludes that the Republic of Rwanda has made notable progress in improving its judicial system. Its legal framework contains satisfactory provisions concerning jurisdiction and criminalises Gaspard Kanyarukiga's alleged conduct. The death penalty has been abolished. However, the Chamber is not satisfied that Kanyarukiga will receive a fair trial if transferred to Rwanda. First, it is concerned that he will not be able to call witnesses residing outside Rwanda to the extent and in a manner which will ensure a fair trial. Second, it accepts that the Defence will face problems in obtaining witnesses residing in Rwanda because they will be afraid to testify. Third, there is a risk that Kanyarukia, if convicted to life imprisonment there, may risk solitary confinement due to unclear legal provisions in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Request.

Arusha, 6 June 2008.

Erik Møse	Sergei Alekseevich Egorov	Florence Rita Arrey
Presiding Judge	Judge	Judge

8. Décision de la Chambre 2 sur le dossier d'Ildephonse Hategekimana, 19 juin 2008

ICTR-00-55B-R11bis
19-6-2008
(571-548)

571

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER DESIGNATED PURSUANT TO RULE 11 *BIS*

Before Judges: Khalida Rachid Khan, presiding
Asoka de Silva
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 19 June 2008

2008 JUN 19 P 5:35
JUDICIAL RECORDS/ARCHIVES
RECEIVED

THE PROSECUTOR
v.

ILDEPHONSE HATEGEKIMANA

Case No. ICTR-00-55B-R11*bis*

DECISION ON PROSECUTOR'S REQUEST FOR THE REFERRAL OF THE CASE OF ILDEPHONSE HATEGEKIMANA TO RWANDA

Rule 11 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
Bongani Majola
Alex Obote-Odora
Richard Karegyesa
George Mugwangya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

Defence Counsel:
Roberto Ahlonko Dovi
Atu-Quam Claude Dovi-Avouyi

INTRODUCTION

1. The original Indictment against Ildephonse Hategekimana, Tharcisse Muvunyi, and Idelphonse Nizeyimana was confirmed by Judge Yakov Ostrovsky on 2 February 2000.[1] Tharcisse Muvunyi was arrested on 7 February 2000, Ildephonse Hategekimana was arrested on 16 February 2003, while Idelphonse Nizeyimana remains at large.

2. On 11 December 2003, the Prosecutor was granted leave to sever Mr. Muvunyi from the original Indictment and ordered to file a separate indictment against him.[2] Mr. Muvunyi was subsequently tried and convicted, and his appeal is pending before the Appeals Chamber.[3]

3. A pre-trial Chamber subsequently granted the Prosecutor leave to sever Ildephonse Hategekimana from the original Indictment and amend the Indictment against him.[4] On 9 November 2007, Mr. Hategekimana made a further appearance following the filing of the Amended Indictment on 1 October 2007. He pleaded not guilty to all charges.

4. According to the Amended Indictment, Mr. Hategekimana was a Lieutenant in the *Forces Armées Rwandaises* ("FAR") and the Commander of Ngoma Military Camp in Butare *Préfecture*. The Amended Indictment charges Mr. Hategekeimana with genocide, or alternatively, complicity in genocide, as well as murder and rape as crimes against humanity. He is charged with individual responsibility for the crimes pursuant to Article 6(1) of the ICTR Statute, as well as for having failed to prevent or punish his the crimes of his subordinates of which he knew or should have known, pursuant to Article 6(3) of the Statute.

5. Specifically, Mr. Hategekimana is alleged to have ordered, instigated, or otherwise aided and abetted his subordinate soldiers at Ngoma Camp to attack civilian Tutsi at various locations in Butare Town, and to have failed to prevent them from, or punish them for, committing such acts. He is also alleged to have planned such attacks, to have distributed weapons to facilitate them, and to have personally led a number of the attacks, which resulted in the killing of specified individuals. In addition, he is alleged to have raped, and to have ordered his subordinates to rape, Tutsi women.

---

[1] *The Prosecutor v. Tharcisse Muvunyi et al.*, Case No. ICTR-00-55-I, Decision to Confirm the Indictment (TC), 2 February 2000.
[2] *Muvunyi et al.*, Case No. ICTR-00-55-I, Decision Regarding the Prosecutor's Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi (TC), 11 December 2003.
[3] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgement and Sentence (TC), dated 12 September 2006.
[4] Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment of Idelphonse Hategekimana, 25 September 2007 ("Severance and Amendment Decision"). In that Decision, the Chamber noted that the Prosecution now believed **Ild**ephonse to be the proper spelling of Mr. Hategekimana's first name, and authorized the Indictment to be so amended.

Prosecutor's Request for Referral to Rwanda Pursuant to Rule 11 bis *of the Rules of Procedure and Evidence*[5]

6. The Prosecutor has requested that Mr. Hategekimana's case be referred to the authorities of Rwanda for adjudication before a Rwandan court pursuant to Rule 11 *bis*.[6] In accordance with Rule 11 *bis* (A), the President designated a Trial Chamber to decide the Referral Request, comprising Judges Khalida Rachid Khan, presiding, Asoka de Silva, and Emile Francis Short.[7]

7. The Chamber rendered several interim decisions authorizing the Republic of Rwanda, the International Criminal Defence Attorneys Association ("ICDAA"), the *Association des Avocats de la Defence* ("ADAD"), and Human Rights Watch ("HRW") to file submissions in relation to the Referral Request as *amicus curiae* pursuant to Rule 74, and authorizing the Parties to file additional submissions in response.[8] As a result, there are several submissions to consider in addition to the Referral Request itself.[9] Several of the submissions include lengthy annexes.

---

[5] Unless specified otherwise, all Rules referred to in this Decision are from the Rules of Procedure and Evidence.

[6] Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed 7 September 2007 ("Referral Request").

[7] Designation of a Trial Chamber for the Referral of the Case of Idelphonse (sic) Hategekimana to Rwanda (President), 2 October 2007.

[8] Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDAA, and ADAD for Leave to Appear and Make Submissions as Amici Curiae, 4 December 2007 ("First *Amicus Curiae* Decision"); Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions (TC), 20 March 2008 (the "20 March 2008 Decision"); Decision on Defence Request for Reconsideration and Prosecution Request for Extension of Time and Order Regarding the Amicus Curiae Submissions of the ICDAA and the Kigali Bar Association (TC), 30 April 2008.

[9] Réponse de La Défense a: Prosecutor's Request for the Referral of the Case of Idelphonse Hategekimana to Rwanda Pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, filed 19 December 2007 ("Defence Response"); Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for the Referral of the Case of Hategekimana to Rwanda, filed 11 January 2008 ("Prosecution Reply"); Amicus Curiae Brief of the Republic of Rwanda in the Matter of an Application for the Referral of the above case to Rwanda pursuant to Rule 11 *bis*, circulated 10 January 2008 ("Rwanda's Submissions"); Réponse de la Défense au Mémoire Amicus Curiae du Rwanda Produit le 10/01/2008 en Soutien a la Requête de Monsieur le Procureur en Date du 07/09/2007 Relative au Renvoi de l'acte d'accusation de l'Accuse Ildephonse Hategekimana au Rwanda, filed 2 April 2008 ("Defence Response to Rwanda's Submissions"); Request for Leave to Appear as *Amicus Curiae* Pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, filed 27 February 2008. HRW's proposed *amicus* brief was annexed to its request ("HRW's Original Submissions"); Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber, filed 10 April 2008 ("HRW's Further Submissions"); Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11 bis of the Rules of Procedure and Evidence, filed 7 May 2008 ("ICDAA's Submissions"); ICTR-ADAD Submissions as *Amicus Curiae*, circulated 11 April 2008 ("ADAD's Submissions"); Prosecutor's Consolidated Response to "Brief of Human Rights Watch as *Amicus Curiae*" and "Further Submissions as *Amicus Curiae* in Response to Queries from the Chamber", "Brief of *Amicus Curiae*, International Criminal Defence Lawyers (sic) Association, Concerning the

DISCUSSION

Preliminary Matter: Referral of the Original or Amended Indictment?

8. The Prosecutor filed the Referral Request on 7 September 2007, shortly before the pre-trial Chamber delivered the Severance and Amendment Decision. The Defence submits that, as a result, the pending Referral Request cannot be granted because it seeks referral of an Indictment that no longer forms the basis of the Prosecutor's case against Mr. Hategekimana.

9. The Chamber is not convinced by the Defence's argument. A Trial Chamber considering referral should rely on the most recently confirmed, or operative, indictment.[10] Confirmation is part of the amendment process pursuant to Rule 50 (A)(ii). The Chamber therefore considers that the Amended Indictment is the most recently confirmed, or operative, indictment in this case and it is therefore relied upon as the basis of the Referral Request.

***Rule 11* bis**

10. Pursuant to Rule 11 *bis* and the jurisprudence of the Appeals Chamber, a Chamber may order referral to a State that has jurisdiction over the crimes of the accused, and is willing and adequately prepared to accept the case.[11] Prior to ordering referral, a Chamber must be satisfied that the accused will receive a fair trial in the courts of the referral State, and the death penalty will not be imposed or carried out.[12]

11. The ultimate decision on whether to refer is left to the discretion of the Chamber.[13] The Chamber may consider whatever information it reasonably feels it needs

---

Request for Referral of Ildephonse Hategekimana to Rwanda" and "ICTR-ADAD Submissions as *Amicus Curiae*", filed 14 May 2008 ("Prosecutor's Consolidated Response to *Amici*").

[10] *See The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32-1-AR11*bis*.1, Decision on Milan Lukic Appeal Regarding Referral (AC), 11 July 2007, para. 12 (citing *The Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Rule 11 bis Referral (AC), 23 February 2006, para. 14).

[11] Rule 11 *bis* (A); *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11 *bis* Appeal (AC), 30 August 2006, para. 8 ("Bagaragaza Appeal Decision"). The Appeals Chamber of the ICTY has ruled that, despite the possibility of a strict textual reading of Rule 11 *bis* (A) to the contrary, those States in whose territory the crimes were committed and/or in which the accused was arrested must also be willing and adequately prepared to accept the case. *See The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 bis Referral (AC), 1 September 2005, para. 40 ("Stanković Appeal Decision"). ICTR Rule 11 bis (A) is, in relevant part, identical to ICTY Rule 11 *bis* (A).

[12] Rule 11 *bis* (C); In contrast to its ICTY counterpart, ICTR Rule 11 *bis* does not require the Chamber to consider the "gravity of the crimes charged and the level of responsibility of the accused." *See* ICTY Rule 11 *bis* (C).

[13] *See e.g.*, Bagaragaza Appeal Decision, para. 9.

so long as the information assists it in determining whether the proceedings following the transfer will be fair.[14]

Jurisdiction, Willingness, and Adequacy of Preparation

12. To determine whether a State is adequately prepared to accept a case, a Trial Chamber designated pursuant to Rule 11 *bis* must consider whether the referral State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[15]

13. Rwanda expressed that it is willing to accept transfer of the case of Mr. Hategekimana by letter of the Prosecutor General of Rwanda addressed to the Prosecutor of the Tribunal.[16]

Jurisdiction

14. It is not contested that Rwandan courts have personal jurisdiction over Mr. Hategekimana, because, according to the Amended Indictment, he was a Rwandan national whose alleged crimes were committed in Rwanda.[17]

15. The Prosecutor and the Rwandan authorities submit that Rwanda has subject matter jurisdiction over the alleged crimes of Mr. Hategekimana. HRW submits that this is not certain, noting that Article 105 of Rwanda's Organic Law 16/2004 of 19 June 2004 *Establishing the Organization, Competence, and Functioning of Gacaca Courts* ("2004 Gacaca Law") expressly abrogated the Organic Law of 30 August 1996 on the *Organization of the Prosecution of Offences Constituting Genocide or Crimes Against Humanity Committed Since 1 October 1990* ("1996 Genocide Law"). HRW submits that, since the abrogation of the 1996 Genocide Law, there is no law in effect in Rwanda defining the crimes with which Mr. Hategekimana is charged.

16. Mr. Hategekimana is charged with genocide and crimes against humanity. The Prosecutor and the Rwandan authorities suggest several bases for subject matter jurisdiction over these crimes, of which the 1996 Genocide Law is only one. Primary amongst these are the Genocide Convention of 1948 and the four Geneva Conventions of 1949, as well as the additional protocols of 1977, all of which were binding on Rwanda prior to 1994.[18] The Rwandan Constitution of 2003 ("Constitution") states that ratified

[14] Stanković Appeal Decision, para. 50.
[15] *See e.g.*, Bagaragaza Appeal Decision, para. 9 (citations omitted).
[16] Referral Request, Annex A: Letter from Martin Ngoga, Prosecutor General of Rwanda, to Hassan B. Jallow, Prosecutor of the ICTR. In this letter, Mr. Ngoga expressed the willingness of the Rwandan Government to accept the case of Ildephonse Hategekimana, if referred.
[17] Rwandan Penal Code of 18 August 1977, as subsequently amended, Article 6 (Annex D to the Referral Request).
[18] The Republic of Rwanda ratified or acceded to the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide on 16 April 1975; the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War on 5 May 1964; the Additional Protocols to the Geneva Conventions on 19 November 1984. In addition, Rwanda ratified the Convention of 26

treaties are "more binding than organic and ordinary laws."[19] These treaties and conventions define genocide and crimes against humanity. The Chamber notes that the 1996 Genocide Law did not provide separate definitions of genocide and crimes against humanity, but referred to the definitions of these crimes in the conventions as the bases for their definitions in Rwandan law.[20]

17. Organic Law N° 11/2007 of 16/03/2007 *Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States* ("Transfer Law") will govern Mr. Hategekimana's case if it is referred to Rwanda by the Tribunal.[21] The Transfer Law states that persons transferred by the Tribunal to Rwanda shall be liable to prosecution only for crimes falling within the Tribunal's jurisdiction.[22] This provision suggests that accused persons referred by the Tribunal to Rwanda may be tried for crimes as they are defined in the relevant Articles of the Statute of the Tribunal. Moreover, the Chamber notes that the purpose of the 2004 Gacaca Law was to establish the *gacaca* system as the primary venue for prosecution of such crimes, other than for those persons who rank in the "first category", who were to continue to be tried before Rwandan ordinary courts.[23] The Chamber understands that there have been genocide trials in Rwandan ordinary courts since 2004.[24] Given the status of ratified treaties in Rwandan law, the purposes of the 2004 Gacaca Law, and the language of the Transfer Law, the Chamber is satisfied that Rwandan courts have subject matter jurisdiction over genocide and crimes against humanity.

Modes of Liability

18. As for relevant modes of criminal responsibility, the Chamber notes that the Amended Indictment seeks to hold Mr. Hategekimana responsible for individual participation pursuant to Article 6(1) of the ICTR Statute, as well as for command responsibility pursuant to Article 6(3) of the Statute. Rwanda's Penal Code provides for the prosecution of principal perpetrators and accomplices for instigation, preparation and planning, commission, direct and public incitement, provision of instruments or other assistance to principle perpetrators, and for harbouring or aiding perpetrators.[25] The Chamber considers that the modes of criminal responsibility covered in the Rwandan Penal Code are adequate to cover the crimes of the accused as alleged in the Amended Indictment pursuant Article 6(1) of the ICTR Statute.

November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 16 April 1975.

[19] Constitution, Article 190.

[20] 1996 Genocide Law, Art. 1.

[21] Transfer Law, Art. 1.

[22] *Ibid.*, Art. 3.

[23] 2004 Gacaca Law, Articles 1-3.

[24] According to a report commissioned by the Prosecutor based on a mission conducted to Rwanda by the International Legal Assistance Consortium, the Rwandan ordinary courts have prosecuted 207 genocide cases between 2005 and September 2007. These numbers were culled from HGO reports. *See Justice in Rwanda: An Assessment*, (ILAC), November 2007, footnote 6.

[25] *See generally*, Articles 89, 90 and 91 of the Rwandan Penal Code.

19. The Prosecutor's and Rwanda's submissions are silent regarding command responsibility, and the Chamber is not aware of any provisions under Rwandan law that would authorize the High Court, or any Rwandan court, to hold Mr. Hategekimana criminally responsible for the failure to prevent or punish crimes he knew of or reasonably should have known of committed by his proven subordinates. The Chamber will therefore proceed on the assumption that Rwandan law does not recognise command responsibility or did not do so at the time relevant to the Amended Indictment. The Chamber notes that Amended Indictment seeks to hold Mr. Hategekimana responsible under Article 6(3) on all four counts, and cannot ignore the possibility of an acquittal on this basis should it decide to refer the case to Rwanda. The Amended Indictment is structured such that Mr. Hategekimana is to be held individually responsible under Article 6(1) and responsible as a commander under Article 6(3) for the same material facts. Under such circumstances, Mr. Hategekimana will go free in Rwanda if the evidence does not show that he planned, ordered, instigated, committed, or aided and abetted the alleged crimes, even if it does show such involvement on the part of his proven subordinates and that Mr. Hategekimana knew or had reason to know of their actions. Given the importance of command responsibility to the Amended Indictment, the Chamber is not satisfied that there is an adequate legal framework under Rwandan law which criminalizes Mr. Hategekimana's alleged conduct.[26]

Adaptation of the Amended Indictment

20. The Transfer Law also requires the Rwandan Prosecutor General's Office to adapt any transferred indictment to make it compliant with the formal requirements of the Code of Criminal Procedure of Rwanda ("Rwandan CCP").[27] The Defence suggests that this would result in a violation of Mr. Hategekimana's rights because the adapted indictment will comply with laws that are less favourable to accused persons. The Defence provides examples of penalty provisions allowed by the Rwandan CCP in support of this argument. The Chamber rejects the Defence argument. The Chamber recognizes that adaptation of the indictment to comply with the laws of a referral State may be necessary

[26] In the case of *The Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, the ICTY Referral Bench reached a different conclusion. The Referral Bench noted that the 1997/2004 "Criminal Act of Croatia" ("CAC"), which provided for liability for command responsibility, may not be given retroactive effect, and thus the 1993 "Fundamental Crime Statute of Croatia" ("FCSC"), which did not explicitly provide for command responsibility, may be applied to the alleged crimes of the accused persons. In that case, the Referral Bench determined that this was not a bar to referral because (i) other provisions of the FCSC provided for liability for most of the conduct covered under Article 7(3) of the ICTY Statute, and (ii) that "if the acts that in the end can be proven would all fall outside the scope of the provisions of the law to be applied, the case against the Accused would have lost most of its significance and weight." *Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, paras. 38-46. The Chamber does not consider either of these rationales persuasive in the instant case.

[27] Transfer Law, Art. 4.

to effectuate transfer, and notes that adaptation is acceptable pursuant to the jurisprudence and practice of the ICTR and ICTY regarding Rule 11 *bis* referrals.[28]

21. The Defence also submits that the adaptation process may result in an indictment that will include charges outside the Tribunal's jurisdiction. Article 3 of the Transfer Law states, "[n]otwithstanding the provisions of other laws applicable in Rwanda, a person whose case transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR." On its face, the Chamber considers that there may be some ambiguity as to whether the reference in the Transfer Law to "crimes falling within the jurisdiction of the ICTR" refers to both temporal and subject matter jurisdiction. It is not, however, for the Chamber to determine how this provision will be interpreted by Rwandan courts. Regardless, the Chamber does not consider the possibility that Mr. Hategekimana might be charged with criminal acts falling outside the temporal jurisdiction of the ICTR to be fatal to the Referral Request. This possibility does not, of itself, interfere with any of Mr. Hategekimana's rights.[29]

Adequacy of the Penalty Structure under Rwandan Law

22. The Chamber must also consider whether there is an adequate penalty structure to punish the alleged crimes of Mr. Hategekimana under Rwandan law. The Prosecution and Rwanda suggest that the Transfer Law is controlling, and that life imprisonment is the maximum penalty available according to this law. The Chamber notes that this penalty structure is consistent with ICTR Rule 101, which allows for a maximum sentence of life imprisonment. In addition, the Chamber notes that Article 82 of the Rwandan Penal Code provides for consideration of the individual circumstances of a convicted person in determining sentence, and Article 22 of the Transfer Law states that convicted persons will be given credit for time spent in custody or pending appeal. These provisions are also consistent with ICTR Rules on sentencing.[30]

---

[28] *See* Bagaragaza Appeal Decision, para. 17 (noting that the "concept of a 'case' is broader than any given charge in an indictment", and holding that the authorities in the referral State do not have to proceed under their laws with regard to each act or crime in an indictment in the same manner as the Prosecutor of the Tribunal). In addition, the Chamber notes that the ICTY has referred several cases to Bosnia and Herzegovina ("BiH"), which has a law requiring adaptation of referred indictments to render them compliant with BiH law. *See e.g., The Prosecutor v. Radovan Stanković*, Case No. IT-96-23-2-PT, Decision on Referral of Case under Rule 11 *bis* (Referral Bench), 17 May 2005, para. 74.

[29] *Compare, The Prosecutor v. Milan Lukić & Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* (Referral Bench), 5 April 2007, para. 117 (noting that the referral scheme of Rule 11 *bis* implies that the State should exercise its national jurisdiction to try a referred case). In *Lukić & Lukić*, the ICTY Referral Bench engaged in a long discussion of whether referral States could prosecute a referred person for additional national crimes. While the Referral Bench did not consider there to be a simple answer to this question, it did note that, where the accused was a citizen of the referral State prosecution of the accused for national crimes by the referral State was generally not problematic unless such prosecution violated the international obligations of the referral State. The Chamber approves of this reasoning, and finds no problem with the possibility that, if transferred, Rwanda may prosecute Mr. Hategekimana for international crimes that fall within the subject matter jurisdiction of the Tribunal but outside the Tribunal's temporal jurisdiction.

[30] *See* ICTR Rule 101 (B) & (C).

23. The Defence submits, however, that pursuant to Article 3 of Organic Law N° 31/2007 of 25/07/2007 *Relating to the Abolition of the Death Penalty* ("Death Penalty Abolition Law"), Mr. Hategekimana may be subjected to either life imprisonment or life imprisonment with special provisions. The Chamber is not aware of any Rwandan jurisprudence interpreting the relationship between the Death Penalty Abolition Law and the Transfer Law. And it is not for the Chamber to determine how these laws will be interpreted or which law will be applied by Rwandan courts. The Chamber notes that both laws purport to repeal contrary provisions in other laws.[31] The Death Penalty Abolition Law post dates the Transfer Law, which may lead to application of the former over the latter under the principle that a later statute removes the effect of a prior one where they are irremediably inconsistent (*lex posterior derogat priori*). In addition, it is possible that the laws may be interpreted as being consistent, with the Death Penalty Abolition Law providing additional details on the possible legal meaning of "life imprisonment" as that phrase is used in the Transfer Law. In any case, the Chamber cannot rule out the possibility that a Rwandan court will rule that the Death Penalty Abolition Law, and particularly Articles 3 and 4 concerning life imprisonment with special provisions, to be the applicable law regarding penalties for persons transferred by the Tribunal to Rwanda.

24. Pursuant to Article 4 of the Death Penalty Abolition Law, life imprisonment with special provisions means (i) the "convicted person is not entitled to any kind of mercy, conditional release, or rehabilitation" until that person has served at least 20 years in prison, and (ii) the "convicted person is kept in isolation." The Defence argues that the provision removing the possibility of "mercy, conditional release, or rehabilitation" is in conflict with Article 27 of the ICTR Statute and ICTR Rule 124, which allow for the possibility of pardon or commutation of sentence. The Chamber rejects this argument. Article 27 and Rule 124, concerning pardon or commutation of sentence, are limited to circumstances where the legislation of the State in which a person convicted by the Tribunal is serving his sentence expressly allows for such measures. Even then, the President of the Tribunal must authorize such measures before they can take effect.[32] These provisions do not operate to vest convicted persons with additional rights or to impose obligations on States which agree to imprison persons convicted by the Tribunal. By their plain language, they do not apply to persons referred by the Tribunal to the authorities of another State pursuant to Rule 11 *bis*.

25. With regard to the possibility of life imprisonment served in isolation, the Chamber notes that various human rights bodies have adopted the position that imprisonment in isolation may amount to a violation of the rights of the prisoner and should only be used in exceptional circumstances and for limited periods. For example, paragraph 6 of General Comment 20 (Forty-fourth session, 1992) by the Human Rights Committee concerning Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") states that "prolonged solitary confinement of the detained or

[31] *See* Death Penalty Abolition Law, Article 9; Transfer Law, Article 25.
[32] ICTR Rule 125.

imprisoned person may amount to acts prohibited by article 7."[33] While imprisonment in isolation for limited periods does not amount to a *per se* violation of the rights of detained persons, safeguards are generally required to ensure that the use of solitary confinement is not abused.[34] The Death Penalty Abolition Law seems to allow for imprisonment in isolation for 20 years, or more, and does not provide or refer to any such safeguards. Moreover, the Chamber is not aware of any safeguards elsewhere in Rwandan law. The Chamber finds that if transferred and convicted, Mr. Hategekimana could be subjected to a deprivation of his rights through prolonged solitary confinement.

The Death Penalty

26. According to Rule 11 *bis* (C), the Chamber must satisfy itself that "the death penalty will not be imposed or carried out". The Death Penalty Abolition Law states, "The death penalty is hereby abolished." This law expressly abolished the death penalty in Rwanda for all crimes, including crimes of genocide and crimes against humanity, and replaced the death penalty with a maximum sentence of life imprisonment or life imprisonment with special provisions.[35]

27. The Defence argues that other relevant laws in Rwanda still contain the death penalty, and therefore the current legal status of the death penalty in Rwanda is uncertain. This argument is without merit. The Death Penalty Abolition Law expressly states, "[i]n all the legislative texts in force before the commencement of [this] Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law."[36]

28. The Defence submits that there have been extrajudicial killings of detainees in Rwanda, including extrajudicial killings of former FAR members.[37] The Defence suggests that reports of these killings show that Mr. Hategekimana may be killed if referred to Rwanda regardless of the legal status of the death penalty in Rwandan law. The Defence suggests that Mr. Hategekimana is at particular risk as a former member of the FAR. While there have been no independent investigations of the incidents involving

---

[33] Rwanda ratified the ICCPR on 16 April 1975. *See* Rwanda's Submissions, para. 34. Article 7 of the ICCPR concerns prohibits, *inter alia*, torture, or cruel, inhuman or degrading treatment or punishment. The Chamber notes that no derogation is allowed from the obligations of Article 7. *See* General Comment 20, para. 3.

[34] For example, the European Court of Human Rights applying Article 3 of the European Convention on Human Rights, which also prohibits torture or inhuman and degrading treatment or punishment, have held that reasons must be provided for placing persons in isolation, that isolation should not extend indefinitely, and prisoners should be able to seek individual judicial review of prolonged periods of isolation. *See Ramirez Sanchez v. France*, Judgment, European Court of Human Rights, Grand Chamber, App. No. 59450/00, 4 July 2006, paras 120-150.

[35] Death Penalty Abolition Law, Art. 3-5.

[36] Death Penalty Abolition Law, Art. 3.

[37] Defence Response to Referral Request, paras. 99-100 (referring to Annex K, a report by HRW entitled "There will be no Trial: Police Killings of Detainees and the Imposition of Collective Punishments", from July 2007, and Annex L, which includes a public statement from Amnesty International on the need to independently investigate reports of extrajudicial killings of former members of the FAR on 21 December 2005 at Mulindi military detention centre).

police killings of detainees referred to by the Defence, the Chamber notes the Rwandan police offered explanations for these incidents that differ from HRW accounts. The Chamber does not have sufficient information before it, and is not empowered to reach any conclusion on these competing claims. In addition, the Defence does not allege any individual threats against Mr. Hategekimana. Under these circumstances, and in light of the special detention regime designed for persons transferred to Rwanda by the Tribunal,[38] the Chamber does not consider that Mr. Hategekimana faces a serious risk of being killed in Rwandan custody.

29. The Defence also argues that detention conditions in Rwanda are so poor and dangerous as a result of, among other things, overcrowding, unsanitary conditions, and unavailability of food for detainees that to transfer him to Rwandan custody would be effectively a death sentence. The Chamber notes that detention conditions in the prisons of a referral state touch upon the fairness of that state's criminal justice system, and thus are within the mandate of a Trial Chamber sitting under Rule 11 *bis*.[39] The Chamber will further consider the detention conditions in Rwandan prisons below, in the section of this Decision dealing with fair trials in Rwanda.[40] With regard to their relevance to the death penalty, the Chamber recalls the existence of a special detention facility built to international standards for persons transferred from the ICTR to Rwanda.[41] In any event, the Chamber rejects the Defence contention that the detention conditions in Rwanda can be considered an effective death penalty.

Fair Trial

30. Rule 11 *bis* (C) also obligates the Chamber to satisfy itself that "the accused will receive a fair trial in the courts of the State concerned". For present purposes, the Chamber considers that the right to a fair trial includes the following[42]:

> The equality of all persons before the court.
>
> A fair and public hearing by a competent, independent, and impartial tribunal established by law.
>
> The presumption of innocence until guilt is proven according to the law.
>
> The right of an accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
>
> The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

---

[38] This detention scheme is discussed in full in the section dealing with fair trial. *See infra*, paragraphs 76-78.
[39] Stanković Appeal Decision, para. 34.
[40] *See infra*, paragraphs 76-78.
[41] This detention scheme is discussed in full in the section dealing with fair trial. *See infra*, paragraphs 76-78.
[42] *Cf.* Article 20 of the ICTR Statute; Article 14 of the ICCPR.

> The right of an accused to be tried without undue delay.
>
> The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.
>
> The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
>
> The right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
>
> The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings.
>
> The right of an accused not to be compelled to testify against himself or to confess guilt.

31. Another right not part of the trial phase itself but considered integral to the fairness of criminal justice systems is the right of an accused person not to be tried or punished again for an offence for which that person has already been acquitted or convicted.[43]

32. The Prosecution and the Republic of Rwanda submit that Rwandan laws guarantee the rights of accused persons before Rwandan courts. In support of this submissions, they refer to many provisions, including but not limited to Articles 13 through 15 of the Transfer Law, various provisions of the Rwandan Constitution and the Rwandan Code of Criminal Procedure, and international and regional human rights instruments to which Rwanda is signatory, such as the ICCPR, and the African Charter on Human and People's Rights ("AFCHPR").

33. Neither the Defence nor any of the *amici* who submitted briefs in opposition to the Referral Request suggests that the rights of accused persons are not protected under Rwandan law. Rather, they suggest that, in practice, Rwanda has failed to uphold the rights of accused persons in spite of its legal obligations. They submit that Rwanda's prior failures to guarantee the rights of accused persons provide reason to believe Mr. Hategekimana will not receive a fair trial in Rwanda. They therefore invite the Chamber to look beyond the relevant Rwandan laws and consider Rwanda's past practices.

34. The Prosecutor argues that the Chamber's "task is to determine whether the laws applicable to proceedings against the Accused in Rwanda provide an adequate basis for ensuring the right to a fair trial."[44] In support of this claim the Prosecution refers to decisions of the ICTY Appeals Chamber which state that the ICTY Referral Bench was

---

[43] Articles 9 (*Non bis in idem*) of the ICTR Statute; Article 14 of ICCPR, para. 7.
[44] Prosecutor's Reply, para. 36.

not required to look beyond the relevant legislation of a proposed referral State when determining whether an accused will receive a fair trial in that State.[45]

35. The Chamber disagrees with the Prosecutor's description of its task. The Chamber acknowledges that it is not *required* to look beyond the relevant legislation, but considers that it is *authorised* to do so. As the plain language of sub-Rule 11 *bis* (C) states, the Chamber's task is to "satisfy itself that the accused will receive a fair trial in the courts of the State concerned." Determining whether the laws of the referral State provide for a fair trial is part of that process, and may be sufficient where there is no reason to question the application of those laws in practice. The Appeals Chamber has, however, stated that a Referral Chamber may consider whatever information it reasonably feels it needs in order to satisfy itself that the accused will receive a fair trial in the courts of the referral State.[46] Under the particular circumstances of this case, where the Defence and several *amici curiae* submit that the Rwandan judicial system has failed to uphold the rights of the accused in the past, despite legislation requiring it to honour those rights, and where they offer examples of such prior failures, the Chamber considers that it may and should look beyond the relevant legislation to examples of the practices of Rwandan courts.

36. The Prosecutor also submits that referrals are governed by the Transfer Law, no cases have yet been referred to Rwanda under this law, and so there is no basis on which to judge the prior practice of the Rwandan judicial system in applying this law. The Chamber recognises that the Transfer Law was enacted as part of Rwanda's efforts to rebuild and reform its judicial system. But does not accept the Prosecutor's argument that the enactment of a law renders all past practice irrelevant. The Chamber recalls that it is obliged to satisfy itself that Mr. Hategekimana will receive a fair trial in Rwandan courts, not simply that the newly enacted Transfer Law provides for fair trials. The Rwandan Constitution, as well as international treaties such as the ICCPR and regional human rights treaties such as the AFCHPR all contain provisions concerning the rights of accused persons that pre-date the Transfer Law.[47] Rwandan courts have tried persons for genocide under these provisions. The Prosecutor cannot, therefore, reasonably suggest that only the Transfer Law is relevant to the issue of fair trials in Rwanda. The Chamber considers submissions suggesting that Rwanda has not followed its own laws or honoured its treaty obligations in the past to be relevant to the question of whether it will do so in the future.

37. The Chamber will now consider those fair trial rights that the Defence and *amici curiae* submit may not be guaranteed in practice by the Rwandan judicial system.

---

[45] For example, *see The Prosecutor v. Željko Mejakić, et al.*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Referral Decision under Rule 11 *bis* (AC), 7 April 2006, para. 69 (ruling that the Referral Bench did not err by focusing on the legal framework in BiH).

[46] Stanković Appeal Decision, para. 50.

[47] Constitution, Art. 18, 19, 20, 44, 60, & Ch. V; CCP and Law No. 20/2006 of 22/04/2006, *Modifying and Complementing the Law* N° 13/2004 of 17/5/2004 *Relating to the Code of Criminal Procedure* ("Amendment to CCP"); ICCPR, Art. 14; AFCHPR, Art. 7.

Trial by a Competent, Impartial and Independent Tribunal

38. The Prosecution and Rwanda submit, and the Defence and other *amici* do not dispute, that Rwandan law provides for an independent and impartial judiciary. Article 140 of the Constitution states that the "judiciary is independent and separate from the legislative and executive branches of government." Article 142 of the Constitution provides that judges hold tenure for life. These constitutional provisions are supported by other laws which reiterate the independence and impartiality of the Rwandan judiciary.[48] Pursuant to the Transfer Law, a judge of the High Court of the Republic of Rwanda will conduct first instance trials transferred to Rwanda from the Tribunal.[49] Appeals as of right are available for errors of law or fact and are heard by a three judge panel of the Supreme Court of Rwanda.[50]

39. The Defence, HRW, and the ICDAA contest the independence and impartiality of the Rwandan judiciary. The Defence suggests that the judiciary is dominated by the Rwandan Government, that the appointment process for judges of the High Court and the Supreme Court is controlled by the President of Rwanda. The Defence also expresses concern that a single judge will preside over the trial phase in the High Court, claiming this raises issues concerning independence as well as competence. HRW provides specific examples of cases it suggests involve the application of political pressure on the judiciary. The ICDAA suggests that the judiciary is dominated by Tutsis and victims who may have difficulty remaining impartial. The ICDAA also submits that Rwandan reactions to rulings by foreign judges calling for the investigation and prosecution of RPF crimes as well as to findings in favour of accused persons before the ICTR show the current Rwandan government's willingness to interfere with the judiciary.

40. The Chamber does not consider the involvement of the President of Rwanda in the appointment process for the President and Vice-President of the Rwandan Supreme Court, the High Court, and the regular members of the Supreme Court, in itself, to be problematic or exceptional. The Chamber notes that the President's role is not absolute in this regard. After consultation with the Cabinet and the Supreme Council of the Judiciary, the President proposes members of the Supreme Court, but the Senate ultimately elects them.[51] The Chamber does not have before it statistics regarding the ethnic make up of these appointing and consulting bodies, or of the judiciary itself, which has made it difficult to assess the suggestion that the judiciary is dominated by victims of the genocide or the Tutsi ethnic group.[52] The Chamber considers that even if it did have such

[48] *See e.g.*, Amendment to CCP, Art. 1; Organic Law No. 07/2004 of 25 April 2004, *Determining the Organization, Functioning and Jurisdiction of Courts*, Arts. 6 & 64; ICCPR, Art. 14.
[49] Transfer Law, Art. 2.
[50] *Ibid.*, Art. 16. The prosecution and the accused may appeal "an error on a question of law invalidating the decision, or; an error of fact which has occasioned a miscarriage of justice."
[51] Constitution, Articles 147-148.
[52] The ICDAA submits that 90% of judges and prosecutors in Rwanda in 2007 were Tutsi. The Chamber does not have sufficient information before it to verify this figure, but even if true does not consider that such a figure would, of itself, show a lack of independence or impartiality.

information, ethnic imbalance in the judiciary alone would not be sufficient to show impartiality or lack of independence.

41. Nor does the Chamber consider the fact that a single judge will preside over the trial phase before the High Court sufficient to show impartiality or lack of independence. The Chamber does not consider it necessary to engage in a comparative analysis of legal systems, and considers it uncontroversial that single judge trials are a common feature around the world, including for trials of serious crimes. Rule 11 *bis* does not require Rwanda to copy the three judge panel system practiced at this and other international and hybrid tribunals in order to qualify for transfer of cases. Furthermore, international and regional human rights treaties, such as the ICCPR and the AFCHPR, do not require that a trial or an appeal be heard by a specific number of judges to meet fair trial standards. Finally, none of the submissions has provided evidence that single judge trials in Rwanda, which commenced with the judicial reforms of 2004, have been more open to outside influence than previous trials involving panels of judges.

42. The Defence, HRW, and the ICDAA submit that the Rwandan judiciary is subject to government influence. HRW submits that interviews with present and former jurists have led it to believe that the Rwandan judiciary lacks independence, and refers to a select number of specific examples that it suggests show improper influence on the judiciary.[53] The Chamber notes that the examples cited in HRW's submissions involve a limited number of cases over a period of several years where the Rwandan ordinary courts have been dealing with large numbers of cases. The concerns expressed by former members of the Rwandan judiciary lack specificity and context. The Chamber does not consider that the examples and general concerns raised by HRW are sufficient to show such impartiality or lack of independence on the part of the judiciary as to prevent transfer.

43. The ICDAA suggests that the reactions of the Rwandan government to investigations by foreign judges into crimes committed by the RPF, as well as the reactions to decisions of this Tribunal provide reason to question the independence and impartiality of the Rwandan judiciary. The Chamber disagrees. Without commenting on their details, the Chamber notes that these were reactions to the rulings of foreign courts, and do not show how Rwanda would react to rulings by its own courts.[54]

---

[53] HRW refers to interviews conducted from 2005 through 2007 with approximately 25 individuals it describes as "high-ranking judicial officials, judges, prosecutors, and lawyers now or formerly active in the Rwandan judicial system" who informed HRW that Rwandan Courts were not independent, even after 2004. HRW's Original Submissions, para. 51; HRW's Further Submissions, para. 27. HRW also referred to specific examples that it suggests illustrate a lack of judicial independence, such as cases of individuals being arrested on the seeming instruction of Rwandan Government authorities, and the arrest of persons who have criticized the current Rwandan Government, examples of interference in an ongoing trials, and examples of judicial figures being moved to different posts or leaving the country. HRW's Original Submissions, paras. 50, 53, 54; HRW's Further Submissions, paras. 30-35.

[54] The incidents involving Barayagwiza and Bagambiki cited by the ICDAA do not show that the Rwandan judiciary lacks independence or is biased. The Barayagwiza incident occurred several years ago. The ICTR has acquitted five persons since then, and the Rwandan government has not refused to cooperate with the

44. The Defence has also challenged the competence of the Rwandan judiciary to handle transferred cases, suggesting they lack adequate experience. The Chamber has not been presented with details regarding the education and experience levels of the members of Rwanda's High Court or its Supreme Court. Nonetheless, the Chamber notes that the Rwandan judiciary has been rebuilding since the 1994 genocide, Rwandan High and Supreme Court judges are experienced in adjudicating cases involving genocide and crimes against humanity, and must meet minimum educational and experience requirements. The Chamber therefore rejects the Defence submissions regarding competence.

45. The Chamber notes the availability of monitoring and revocation procedures under Rule 11 *bis* D(iv) and F. The Chamber considers that, if it were to transfer Mr. Hategekimana to Rwanda, monitors could inform the Prosecutor and the Chamber of any concerns regarding the independence, impartiality, or competence of the Rwandan judiciary.[55]

46. The Chamber concludes that, although the "concept of an independent judiciary is relatively new in Rwanda",[56] the submissions of the parties do not sufficiently call into question the independence, impartiality and competence of the Rwandan judiciary to prevent transfer.

The Presumption of Innocence

47. Article 13 (2) of the Transfer Law recognizes that an accused person transferred by the Tribunal to Rwanda "will be presumed innocent until proven guilty." This principle is also recognized in the Constitution, the Rwandan Code of Criminal Procedure and in the ICCPR.[57]

48. The Defence and HRW submit that, if transferred, Mr. Hategekimana may not benefit from the legally recognized presumption of innocence. The Defence suggests all former members of the FAR are presumed to have participated in the Rwandan genocide. HRW submits that statements by government officials concerning accused persons, the denial of voting rights to accused persons, and the practice of collective punishment all raise concerns that Mr. Hategekimana may not be presumed innocent until proven guilty if his case is transferred to Rwanda.

49. The Chamber recognizes that the present situation, which involves transfer of a former military adversary of some members of the current Rwandan government, calls for awareness of the risk of victor's justice, and thus careful scrutiny. Having said that,

---

Tribunal as a result of these acquittals. The Bagambiki incident did not involve re-trial for crimes for which he was acquitted by the ICTR, but trial for crimes for which he was not charged.

[55] Stanković Appeal Decision, paras. 50-52 (ruling that it was reasonable for the Referral Bench to satisfy itself that the accused would receive a fair trial in part on the basis of the Rule 11 *bis* monitoring and revocation mechanism).

[56] *Justice in Rwanda: An Assessment*, (ILAC), November 2007, Section 6.3.7.

[57] Constitution, Art. 19; Amendment to CCP, Art. 44; ICCPR, Art. 14 (2).

the Defence's claim that Mr. Hategekimana will be presumed guilty is unsupported and speculative.

50. HRW's submissions do not support the claim that accused persons are not presumed innocent in practice. The denial of voting rights for accused persons does not show that they will not be presumed innocent in criminal proceedings. Similarly, allegations of collective punishment of persons living in areas where crimes have been committed, though they may raise issues to be addressed within Rwanda's criminal justice system, do not rise to the level to suggest that Rwanda fails to recognize the presumption of innocence at trial. Nor do they suggest that judges of the Rwandan High Court, to which Mr. Hategekimana would be transferred, will fail to uphold the presumption of innocence. Moreover, the Rwandan authorities dispute the factual details of HRW's claims and deny any official involvement in such incidents. The Chamber therefore has no reason to believe that Mr. Hategekimana will be subjected to such deprivations.

51. The Defence and HRW also submit that certain statements by Rwandan officials call into question the application of the presumption of innocence in practice. Without commenting on the substance of these statements, the Chamber notes that they are general in nature and do not concern the guilt or innocence of specific accused persons.

52. The Chamber finds that Rwandan law recognizes the presumption of innocence. The Chamber does not consider that the submissions and examples of the Defence and HRW show that Mr. Hategekimana will not be presumed innocent.

Legal Assistance

53. Article 13 (6) of the Transfer Law recognizes the right of accused persons to counsel of their choice, and the right to free legal assistance for indigent persons. The Defence, HRW, and the ICDAA claim that Rwanda cannot guarantee these rights in practice because of the lack of a sufficient number of willing and capable lawyers in Rwanda, and because of the unavailability of funds for indigent accused in Rwanda. Even where such funds have been available in the past, they have not been disbursed to defence counsel representing indigent accused persons.

54. According to HRW, the Rwandan Bar Association consisted of 274 members at the beginning of 2008. Though this is a small number relative to the case load faced by Rwandan courts, the Chamber notes that, according to the Rwandan Government, members of the Rwandan Bar are available and willing to defend persons transferred from the Tribunal to Rwanda. Members of the Rwandan Bar Association have experience defending genocide cases.[58]

[58] The Chamber has not been provided with any specific or statistical information on the number of members of the Rwandan Bar Association who have experience in defending genocide cases, but it is clear from the submissions that Rwandan lawyers have represented persons accused in such cases. For example, HRW's Original Submissions, paras. 69-74 (discussing the experiences of Rwandan lawyers defending

55. Regarding the availability of free legal assistance to indigent accused, the Chamber notes that, while this may have been a problem in the past, the Rwandan Government claims that 250 million Rwandan Francs (approximately $500,000 U.S. dollars) have been set aside to fund the legal aid scheme, with funds to be provided by *Avocats Sans Frontiers* ("ASF") in cooperation with the Belgian Technical School. HRW acknowledges that ASF and a Belgian government organization disbursed funds for legal assistance to indigent clients in Rwanda during 2007, some of whom were accused of genocide.[59] At this stage, the apparent availability of funds is sufficient to satisfy the Chamber that free legal assistance would be available to Mr. Hategekimana if transferred and found indigent by the Rwandan authorities.[60] If this were to become a problem upon transfer, the Chamber considers that the availability of monitors and the possibility of revocation of referral could rectify any subsequent failure by the Rwandan authorities to make counsel available or disburse funds for legal assistance.[61]

Ability of the Defence to Exercise its Function

56. Article 15 of the Transfer Law recognizes the right of defence teams to perform their duties free of government interference and, if requested, with security and protection.

57. The Defence, HRW, the ICDAA, and ADAD claim that, in practice, Rwanda cannot guarantee the ability of the Defence to exercise its function. More specifically, they claim that the Rwandan government may not be able to adequately protect defence teams or facilitate travel and investigation by the Defence throughout the country. Rather, they claim the Rwanda government has actively interfered with and impeded defence teams in the past.

58. The allegations regarding interference with the Defence can be divided into two categories: (i) the inability of defence teams to obtain documents in a timely manner or at all; and (ii) threats and intimidation to members of defence teams, including the arrest of defence team members in connection with their work. Without examining their details here, the Chamber acknowledges that the examples provided by the Defence and *amici* suggest that a defence team may face difficult working conditions in Rwanda. But the Chamber notes that, though troubling, the examples are discrete; they do not show widespread abuses. Nor do they show that the Defence will be unable to exercise its function. In this regard, the Chamber notes that ICTR defence teams have generally been able to work in Rwanda. In addition, the new legal scheme for transfers, including Article 15 of the Transfer Law, is untested in this regard and may provide additional protections.

---

persons accused of genocide before Rwandan courts). The Chamber notes that the experiences of Rwandan lawyers described in HRW's submissions were problematic, but HRW acknowledges that lawyers have stated that Rwandan lawyers have stated that they would be willing to represent accused persons transferred to Rwanda by the ICTR if they were assured adequate compensation. HRW's Original Submissions, para. 73.

[59] HRW's Original Submissions, para. 78.

[60] Stanković Appeal Decision, para. 21.

[61] Stanković Appeal Decision, paras. 50-52.

59. HRW suggests that the current Rwandan campaign against "genocidal ideology" may impede a vigorous defence. HRW acknowledges that proposed legislation specifically criminalizing genocidal ideology has not yet been adopted, but submits that the Constitution commits Rwanda to fight "the ideology of genocide and all its manifestations", and Article 4 of a 2003 law punishing the crime of genocide, crimes against humanity, and war crimes prohibits "any gross minimalization of the genocide, any attempt to justify or approve of genocide, and any destruction of evidence of the genocide."[62] Another law criminalizing and punishing genocidal ideology has been passed by the Rwandan National Assembly and is currently under consideration by the Rwandan Senate.[63] Without questioning the legitimacy of legislation against hate speech and noting that Holocaust denial is criminalized in other states, the Chamber recognizes the possibility for abuse of such provisions. The Chamber also notes, however, that no such cases involving members of defence teams have been brought to its attention. Therefore, such concerns are speculative at this point.

60. The Chamber notes that, while the issues raised by the Defence and *amici* do suggest the possibility of some difficulties for the Defence in exercising its function, the Chamber does not consider that these difficulties show that Mr. Hategekimana would not receive a fair trial. In addition the Chamber notes that, were it to transfer Mr. Hategekimana to Rwanda, the monitoring and revocation scheme under Rule 11 *bis* could serve as a safeguard to ensure that the Defence was not prevented from effectively carrying out its function.[64]

Availability and Protection of Witnesses

61. The Chamber notes that the issue of witness protection is "instrumental to the issue of witness availability", and thus "relevant to the fairness of a trial as it may affect an accused's right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him."[65]

62. Article 14 of the Transfer Law provides a detailed witness protection regime expressly linked to ICTR Rules 53, 69 and 75. It also refers to the facilitation of witness testimony, including "immunity from search, seizure, arrest or detention during their testimony and during their travel to and from trials" for witnesses coming to testify from abroad. The Prosecution and the Rwandan Government submit that this regime is adequate to guarantee the safety of all witnesses who may testify in cases referred by the Tribunal to Rwanda. They suggest that this regime should also ensure witness attendance, and that arguments to the contrary by the Defence and *amici* are speculative.

---

[62] Law 33/bis/2003, *Punishing the Crime of Genocide, Crimes Against Humanity and War Crimes*, Art. 4 ("2003 Law").
[63] HRW's Further Submissions, para. 18.
[64] Stanković Appeal Decision, paras. 50-52.
[65] *See Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis (TC), 14 September 2005, para. 49.

63. The Defence, HRW, and the ICDAA argue that Rwanda cannot adequately protect witnesses, and refer to examples of threats, harassment, and violence committed against witnesses. They also allege that official action has been taken against defence witnesses in the past, suggesting Rwandan Government involvement or complicity. The Defence, HRW and the ICDAA suggest that Mr. Hategekimana may be unable to convince witnesses, whether residing in Rwanda or abroad, to testify on his behalf. HRW also submits that witnesses may be unwilling to testify on behalf of persons accused of genocide for fear of falling afoul of genocidal ideology laws prohibiting minimization, negation, justification or approval, or destruction of evidence of genocide. The Defence adds that most of its witnesses will come from outside Rwanda, and many are refugees for whom any return to Rwanda would be in violation of their refugee status.[66]

64. As a preliminary matter, the Chamber notes that no judicial system can guarantee absolute witness protection.[67] Regarding the claim that the Rwandan witness protection service cannot adequately protect witnesses due to a lack of adequate resources and too few personnel, the Chamber notes that, according to HRW, some 900 witnesses have been assisted through the program since its inception. The examples cited by HRW in particular show that there has been sporadic violence against prosecution witnesses in particular, but the Chamber has not been given any information to suggest that the examples referred to by HRW and the ICDAA concerned witnesses who had availed themselves of the witness protection service. While the funding and personnel issues faced by the witness protection service may suggest that it faces challenges, they do not show that it is ineffective.

65. The Defence, HRW, and the ICDAA have offered examples where defence witnesses have been threatened and harassed after testifying on behalf of persons accused in ordinary and *gacaca* courts in Rwanda and before the ICTR. Others have been arrested or accused in *gacaca* proceedings after providing such testimony.

66. HRW stresses the possible negative impact of Rwanda's laws concerning genocidal ideology on the willingness of witnesses to testify on behalf of accused persons. HRW refers to three parliamentary commissions which studied genocidal ideology. According to HRW, the first commission interpreted the term to include opposition to government policies, including land reform, support for opposition candidates, or discussion of war crimes allegedly committed by the Rwandan Patriotic Army ("RPA"), the military branch of the Rwandan Patriotic Front ("RPF"). HRW suggests that the second and third commissions also applied the term broadly. Government officials have denounced "hundreds of people and dozens of Rwandan and

---

[66] The Defence has not filed, or been ordered to file a witness list pursuant to ICTR Rule 73 *ter*, which is not unusual at this stage of the proceedings before the Tribunal. Nonetheless, this makes the Defence assertions about its prospective witnesses difficult for the Chamber to assess. Considering that large numbers of defence witnesses testifying before the Tribunal come from outside Rwanda, the Chamber considers it appropriate to assume the veracity of the Defence assertions for the purposes of consideration of the Referral Request.

[67] *The Prosecutor v. Gojko Janković*, Case No. IT-96-23-2-AR11bis.2, Decision on Rule 11 *bis* Referral (AC), 15 November 2005, para. 49.

international organizations" for holding "genocidal ideas". HRW also provides examples showing that Rwanda's campaign against genocidal ideology has also been carried out in the judicial system pursuant to the 2003 Law, and where the Rwandan judicial authorities have sought to extend application of this law beyond national boundaries.[68] Without questioning the legitimacy of such laws, the examples provided show that the language has been interpreted broadly on occasion. Moreover, HRW provides examples of some witnesses who have stated they would not be willing to testify for fear of prosecution under these laws.

67. The Chamber accepts that, regardless of whether their fears are well founded, witnesses in Rwanda may be unwilling to testify for the defence as a result of the fear that they may face threats, harassment, arrest or accusations of harbouring "genocidal ideology."

68. There may be additional difficulties obtaining witness testimony from outside Rwanda. Regardless of the protections promised under Rwandan law, the Chamber accepts that many defence witnesses residing outside Rwanda may be unwilling to travel to Rwanda to testify.[69] In addition, the Defence claims and ICTR experience confirms that many Defence witnesses residing outside Rwanda have claimed refugee status, and thus there may be legal obstacles preventing them from returning to Rwanda.[70]

69. Pursuant to Article 28 of the ICTR Statute and ICTR Rule 54, the Tribunal may issue subpoenas with the assistance of international parties to obtain the live testimony of unwilling witnesses. This is not the case in Rwanda. The Chamber is not aware of Rwanda's participation in conventions concerning mutual assistance in criminal matters.[71] Rwanda may therefore face difficulties securing the attendance of witnesses living abroad.

70. The Prosecution and Rwanda offer video-link as a solution. While this may be an adequate solution for some witnesses, the Chamber notes that the Defence claims that most of its witnesses are living outside Rwanda. The Chamber is not aware of any Rwandan legislation or case law addressing the weight to be given to video-link testimony, or under what circumstances it should or should not be authorized. At this

---

[68] HRW's Further Submissions, paras. 22-25.

[69] The Chamber notes a statement by the Rwandan Minister of Justice regarding the immunity for witnesses granted under the Transfer Law. The Minister stated that immunity "will be a step towards their being captured. They will have to sign affidavits on which their current address will be shown and that would at any other time lead to their arrest." As HRW noted, "This comment, widely circulated among Rwandans in the diaspora, served only to confirm the fears of many Rwandans that the immunity guaranteed by the transfer law was in fact a falsehood to facilitate their later arrest and forced return to Rwanda." HRW's Original Submissions, paras. 38-40. The Chamber accepts that this statement may contribute to the unwillingness of witnesses outside Rwanda to enter the country to testify for the Defence.

[70] For example, *see* Convention Relating to the Status of Refugees (1951), Art. 1 (C)(1) (Noting that the convention will no longer apply to persons who voluntarily avail themselves of the protection of their country of nationality).

[71] *See* Stanković Appeals Decision, para. 26 (noting the relevance of Bosnia and Herzegovina's ratification of the European Convention on Mutual Assistance in Criminal Matters to the issue of obtaining witnesses).

Tribunal, the preference is that witnesses testify in court.[72] Video-link testimony is an exception to this norm, and may be given less weight as a result of the possible difficulties that accompany electronic transmission.[73] In addition, video-link testimony may not be appropriate for key witnesses.[74] The Chamber considers that hearing most defence witnesses in a case by video-link after hearing witnesses for the Prosecution in court may violate Mr. Hategekimana's right to a fair trial, in particular his right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[75]

71. The Chamber concludes that the Defence may face difficulties in obtaining the testimony of witnesses living in and outside Rwanda and is not satisfied that Mr. Hategekimana will receive a fair trial under such circumstances.[76]

Double Jeopardy

72. The protection against double jeopardy is guaranteed by Article 9 of the Tribunal's Statute (*non bis in idem*). HRW submits that Article 93 of the 2004 Gacaca Law authorizes, at least implicitly, the re-trial of persons for crimes for which they have already been tried in conventional courts. According to HRW, such re-trials at the *gacaca* level have occurred in dozens of cases.

73. The Prosecution does not dispute that such re-trials have occurred but submits that these cases did not involve re-trial of cases under the Transfer Law, Article 25 of which states that the provisions of the Transfer Law will apply in the case of conflict with any other laws. In addition, Article 13 of the Transfer Law states that the rights recognized therein are without prejudice to other rights recognised under Rwandan law, including, *inter alia*, the ICCPR, which prohibits double jeopardy in Article 14.

---

[72] *See e.g.*, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15.

[73] *See The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996, para. 21 (noting that "the evidentiary value of testimony provided by video-link ... is not as weighty as testimony given in the courtroom. Hearing of witnesses by video-link should therefore be avoided as far as possible"); *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT via Video-Link (TC), 8 October 2004, para. 15.

[74] *See The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal (AC), 30 October 2006, para. 19 (accepting as an important interest the Trial Chamber's concern over its ability to assess the credibility of a particularly important witness via video-link).

[75] In addition to the problems discussed above, the Chamber notes that such a scenario may raise equality of arms issues. *See The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 43-56. But the Chamber also notes that, generally, matters outside the control of the court are not considered to raise equality of arms issues. *Ibid.*, para. 49. The Chamber notes, however, that decisions to allow or disallow video-link testimony on the basis of the importance of a witness's testimony, and/or to give less weight to testimony heard by video-link are within the control of the court.

[76] *Cf.*, *Tadić*, Judgement (AC), para. 55 (noting the possibility of a situation where a fair trial is not possible because important defence witnesses do not appear as a result of circumstances outside the control of the court).

74. The Chamber notes that pursuant to Article 190 of the Rwandan Constitution, international treaties such as the ICCPR are more binding than organic laws and other Rwandan domestic legislation, which may suggest that the provisions of the ICCPR should overrule contrary provisions of the 2004 Gacaca Law. Both the 2004 Gacaca Law and the Transfer Law are organic laws, but the Transfer Law is *lex posterior* and may be found to apply in cases of conflict. None of the examples of re-trial in gacaca courts cited by HRW occurred under the Transfer Law, which establishes the High Court and the Supreme Court as the only competent courts to hear cases transferred by the Tribunal to Rwanda.[77] Given the relevant provisions of the Transfer Law, the ICCPR, and the Constitution, the Chamber is satisfied that Mr. Hategekimana would not be subjected to re-trial in gacaca courts if his case were to be transferred to Rwanda.

Detention Conditions

75. As noted above, detention conditions touch upon the fairness of a state's criminal justice system, and are therefore within the mandate of a Trial Chamber sitting under Rule 11 *bis*.[78] The Chamber has already considered problems with Rwanda's law as it relates to post-conviction detention conditions in the section dealing with penalty structure.[79] The Chamber will now consider pre-trial detention conditions.

76. Article 23 of the Transfer Law states that persons transferred to Rwanda by the ICTR for trial shall be detained in accordance with international standards, and that the International Committee of the Red Cross ("ICRC") or an ICTR appointed observer shall have the right to inspect the detention conditions of transferred persons.

77. The Defence, HRW, and the ICDAA submit that detention conditions may not comply with internationally recognized standards, and point to past problems of chronic overcrowding, unsanitary conditions and insufficient food stores to feed detainees. The Prosecution and the Rwandan authorities submit that Mr. Hategekimana would be detained in new facilities built, or in the process of being built to international standards in Mpanga and in Kigali.[80] This facility has been visited by outside observers.[81] The only issue raised by the Defence, HRW, and the ICDAA regarding these new facilities is that they are not yet be completed. The Chamber notes that, if it were to order transfer of Mr. Hategekimana's case it could do so on the condition that transfer not be given effect until completion of the facilities in Mpanga.[82]

---

[77] Transfer Law, Art. 1.
[78] Stanković Appeal Decision, para. 34.
[79] *See supra*, paras. 22-25.
[80] Rwanda's Submissions, paras. 30-33.
[81] Rwanda's Submissions, para. 31.
[82] *See* Stanković Appeal Decision, para. 50 (noting that the Chamber can issue whatever orders it feels are necessary to assist it in satisfying itself that an accused will receive a fair trial in the referral State).

Conclusion

78. The Chamber notes that Rwanda has made significant progress in rebuilding to its criminal justice system, which was crippled as a result of the events of 1994. Nonetheless, some obstacles to referral of Mr. Hategekimana's case remain. The Chamber:

(i) is not satisfied that Rwanda's legal framework criminalizes command responsibility;

(ii) is not satisfied that Rwanda can ensure Mr. Hategekimana's right to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him; and

(iii) considers it possible that, pursuant to Rwandan law, Mr. Hategekimana may face life imprisonment in isolation without adequate safeguards in violation of his right not to be subjected to cruel, inhuman or degrading punishment.[83]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Referral Request.

Arusha, 19 June 2008

Khalida Rachid Khan
Presiding Judge

Asoka de Silva
Judge

Emile Francis Short
Judge

[Seal of the Tribunal]

[83] Given this conclusion, the Chamber does not consider it necessary to further discuss the role of monitoring and revocation, as contemplated under Rule 11 bis (D)(iv) and (F).